Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARTHUR CALDERON, Warden, *Petitioner*,

v.

HORACE EDWARDS KELLY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Whether a final judgment dismissing a case for failure to comply with the one-year period of limitation for filing an application for a writ of habeas corpus, mandated by the Antiterrorism and Effective Death Penalty Act of 1996, is governed by res judicata principles.

2. Whether a request for counsel in a capital case in federal district court pursuant to 21 U.S.C. § 848(q)(4)(B) makes a case pending for the purpose of determining if it is subject to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996.

3. Whether the inability to assist counsel is a valid justification for equitably tolling the one-year statutory limitation period of the Antiterrorism and Effective Death Penalty Act of 1996.

4. Whether the statutory limitation period of the AEDPA may be equitably tolled after its expiration.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No.

ARTHUR CALDERON, Warden, *Petitioner*,

v.

HORACE EDWARDS KELLY, *Respondent*.

Petitioner Arthur Calderon, Warden of the California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

People v. Horace Edwards Kelly, 51 Cal. 3d 931, 275 Cal. Rptr. 160, 800 P.2d 516 (1990), cert. denied 502 U.S. 842 (1991) (Kelly I), a published Opinion of the California State Supreme Court affirming Kelly's judgment of conviction and death sentence in his Riverside County case.

People v. Horace Edwards Kelly, 1 Cal. 4th 495 (1992), cert. denied 506 U.S. 881 (1992) (Kelly II) a published Opinion of the California State Supreme Court affirming Kelly's judgment of conviction and death sentence in his San Bernardino County case.

In re Horace Edwards Kelly (Cal. Supreme Case Nos. S026194, S017561, S069124 and S069125), unpublished orders of the California Supreme Court denying petitions for writ of habeas corpus by Kelly.

Horace Edwards Kelly v. Daniel Vasquez, (June 17, 1997), U. S. Dist.Ct. C.D. Cal. Nos. CV-92-5420-TJH

and 93-2951-TJH), unpublished order of the United States District Court for the Central District of California denying motion by Warden Calderon to dismiss and vacate the stays of execution and ordering that the AEDPA statute of limitations did not apply to Kelly's cases. A copy appears at Appendix 1.

Calderon v. U.S. District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III), Petition for Rehearing and Rehearing En Banc denied January 4, 1998, cert. denied __U.S.__, 118 S. Ct. 1396, a published Opinion by the United States Court of Appeals for the Ninth Circuit granting Petitioner Calderon's Petition for Writ of Mandate to the United States District Court for the Central District of California ordering the dismissal of proceedings in that court due to Kelly's failure to file a petition for writ of habeas corpus within the one-year limitation period. A copy appears at Appendix 2.

Horace Edwards Kelly v. Daniel Vasquez, (February 2, 1998, U.S. Dist. Ct. C.D. Cal. Nos. CV-92-5420-TJH and CV-93-2951-TJH), unpublished order of the United States District Court for the Central District of California dismissing the cases and vacating the stays of execution pursuant to the Ninth Circuit's mandate. A copy appears at Appendix 3.

Horace Edwards Kelly v. Arthur Calderon, (June 3, 1998, U.S. Dist.Ct. C.D. Cal. Nos. CV-98-2722-TJH and CV-98-2723-TJH), unpublished order of the United States District Court for the Central District of California granting equitable tolling and permitting Kelly to challenge his state court convictions by way of federal habeas corpus. A copy appears at Appendix 4.

Calderon v. U.S. District Court, Case No. 98-70569 Slip Op. (9th Cir. Jun. 9, 1998) (Kelly IV) a published Opinion by the United States Court of Appeals for the Ninth Circuit granting Warden Calderon's Petition for Writ of Mandate to the United States District Court for the Central District of California ordering the court to

dismiss habeas petitions filed by Kelly in contravention of the previously granted Writ of Mandate. The opinion was withdrawn upon the grant of en banc review. Calderon v. United States District Court, Case No. 98-70569, 1998 WL 351217 (9th Cir. Jun. 26, 1998). A copy appears at Appendix 5.

Calderon v. U.S. District Court, Case No. 98-70569 __ F.3d __ (9th Cir. 1998) (Kelly V) a published en banc opinion of the United States Court of Appeals for the Ninth Circuit filed on December 15, 1998, reconsidering the prior two opinions of the three-judge panel and denying the Petition for Writ of Mandate. A copy appears at Appendix 6.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeal for the Ninth Circuit was filed December 15, 1998. The jurisdiction of this Court is invoked under Title 28 of United States Code § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

The following statutes and rules are relied on and referred to in this Petition and their pertinent text may be found in Appendix 7.

1. Section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, appearing in Chapter 153 of Title 28 of United States Code § 2244.

2. Title 21 of the United States Code § 848(q)(4).

3. Rules of Civil Procedure, Rule 3, Commencement of Action.

STATEMENT OF THE CASE

On May 26, 1986, Horace Edwards Kelly was sentenced to death following his conviction for murdering 11-year-old Danny Osentowski in Riverside County California. On November 26, 1990, the California Supreme Court affirmed Kelly's conviction and death sentence following his automatic direct appeal. People v. Kelly, 51 Cal. 3d 931, 275 Cal. Rptr. 160, 800 P.2d 516 (1990). On October 7, 1991, this Court denied Kelly's Petition for Writ of Certiorari. Kelly v. California, 502 U.S. 842 (1991). On January 15, 1992, pursuant to 21 U.S.C. § 848(q)(4)(B), the United States District Court, Central District of California stayed Kelly's execution and appointed counsel to represent him. Case No. CV 92-5420-TJH. On January 5, 1996, a next friend, Kelly's mother, was appointed to represent Kelly's interest.

On February 25, 1988, Kelly was sentenced to death following his convictions for murdering two women while attempting to rape them in San Bernardino County California. On January 16, 1992, the California Supreme Court affirmed Kelly's convictions and death sentence following his automatic direct appeal. People v. Kelly, 1 Cal. 4th 495, 3 Cal. Rptr. 2d 677, 822 P.2d 385 (1992). On October 5, 1992, this Court denied Kelly's Petition for Writ of Certiorari. Kelly v. California, 506 U.S. 881 (1992). On June 4, 1993, pursuant to 21 U.S.C. § 848(q)(4)(B), the United States District Court, Central District of California stayed Kelly's execution and appointed counsel to represent him. Case No. CV 93-2951-TJH. On January 5, 1996, a next friend, Kelly's mother, was appointed to represent Kelly's interests.

On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Among other changes the new legislation imposed a one-year time limit for the filing of federal habeas corpus petitions.

On May 2, 1997, because a Petition for Writ of Habeas Corpus had not been filed by Kelly within the one-year limitation period of the AEDPA, a motion to dismiss and vacate the stays of execution was filed. When the District Court denied the motion on the basis that the AEDPA did not apply to Kelly's proceedings, a Petition for Writ of Mandate was filed in the United States Court of Appeals for the Ninth Circuit. On September 9, 1997, the Ninth Circuit Court of Appeals issued its Opinion granting the Petition for Writ of Mandate and issued the Writ directing the United States District Court to dismiss the matters forthwith. Calderon v. U.S. District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III). On January 14, 1998, the Ninth Circuit Court of Appeals issued an order denying the Petition for Rehearing and Suggestion for Rehearing In Banc and again ordered the District Court to dismiss the proceedings and vacate the stays of execution. On February 6, 1997, the United States District Court complied with the Order of the Ninth Circuit Court of Appeals and dismissed the proceedings. On February 17, 1998, Kelly filed a Petition for Writ of Certiorari in this Court. On April 6, 1998, this Court denied the Petition for Writ of Certiorari. Kelly v. Calderon, ___ U.S. ___, 118 S. Ct. 395 (1998).

Based on the finality of the federal proceedings new execution dates were set. However, due to a finding by the Warden of San Quentin State Prison, pursuant to California Penal Code section 3701 that Kelly may have become insane for purposes of execution the matter was referred to the Marin County District Attorney's Office for a jury determination of sanity. That proceeding began on April 6, 1998.

On March 31, 1998, Kelly, through counsel who was representing him in the state sanity hearing filed two Petitions for Writ of Habeas Corpus in the California Supreme Court. These petitions were eventually denied on June 2, 1998, and June 26, 1998.

On April 6, 1998, the United States District Court, Central District permitted the filing of two Petitions for Writ of Habeas Corpus, under the same case numbers of the proceedings previously dismissed, which included, among other claims, those then pending in the California Supreme Court. Also filed were various motions, including one for equitably tolling, and a request to stay the execution dates. The pleadings were prepared by the federal public defender. The federal public defender was not appointed, retained or otherwise authorized to represent Kelly who was being represented by different counsel in the ongoing state court litigation. One petition challenged the Riverside convictions and the other the San Bernardino convictions.

At a hearing on April 10, 1998, the District Court noted that the petitions were improperly filed under the case numbers ordered dismissed by the Ninth Circuit in Kelly III and stated it had no jurisdiction. On April 13, 1998, the two habeas petitions were refiled in the District Court and given new numbers, CV 98-2722 and CV 98-2723. Warden Calderon filed a motion to dismiss on April 14, 1998. On April 15, 1998, the federal public defender was appointed to represent Kelly although he was still being represented by different counsel in the ongoing state court proceedings. Over Warden Calderon's objection, the federal public defender was also appointed as Kelly's next friend. Kelly's motion for a stay of execution was taken under submission as well as his motion for equitable tolling of the one-year statutory limitation period of the AEDPA. Warden Calderon's motion to dismiss the proceedings was also taken under submission.

On April 23, 1998, Warden Calderon filed a Petition for Writ of Mandamus in the Ninth Circuit requesting that the District Court be ordered to dismiss the petitions as being filed in violation of the writ issued in Kelly III. On May 6, 1998, the Petition was denied.

On May 15, 1998, a five week trial was concluded in Marin County and the jury reached a verdict that Kelly was sane for purposes of execution. On May 26, 1998, another Petition for Writ of Mandamus was filed by Warden Calderon in the Ninth Circuit asking again that the District Court be ordered to dismiss the habeas petitions.[1] While the Petition for Writ of Mandamus was pending, on June 3, 1998, the District Court granted Kelly's motion and ordered the one-year statutory limitation period for filing a habeas petition equitably tolled and stayed his execution. On June 9, 1998, the Ninth Circuit issued a second Writ of Mandamus directing the District Court to dismiss the habeas petitions with the exception of those claims challenging the sanity determination. A Petition for Rehearing and Suggestion for Rehearing En Banc was granted and the panel decision was ordered withdrawn. On December 15, 1998, the Opinion of the en banc panel was filed. It reconsidered both of its previous Opinions, denied the Petition for a Writ of Mandamus and ruled that res judicata did not preclude the en banc panel from reconsidering the final decision granting the initial Writ of Mandamus and that the AEDPA did not apply since Kelly's act of requesting counsel made his case pending prior to the effective date of the AEDPA. The en banc ruling also held that equitable tolling granted after the filing of the petition for writ of mandamus was proper and that inability to assist counsel would support equitable tolling of the AEDPA limitation period.

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1. The jurisdiction of the United States Court of Appeals for the Ninth Circuit was pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

A. Reasons for Granting the Writ

Recently in Calderon v. Thompson, __ U.S. ___, 118 S. Ct. 1489 (1998), this Court stressed the importance of the State's reliance on the determination that a federal habeas proceeding is final. In the present case the en banc Ninth Circuit Court of Appeals ignored a final determination that Kelly had forfeited his right to federal habeas relief due to his failure to file a timely petition. This Court should exercise its supervisorial powers and correct this clearly erroneous decision.

Previously, every Circuit of the United States Court of Appeals, including the Ninth Circuit, has consistently held that the appointment of counsel pursuant to 21 U.S.C. § 848(q)(4)(B) did not make a case pending for the purpose of determining if the AEDPA rules would apply. By altering its view on this important question of law the Ninth Circuit has now created a conflict with the other circuits that can be resolved only by this Court.

In addition, the en banc Opinion has created a new rule of law that Kelly has a right to be able to assist counsel in his federal habeas proceedings and therefor his alleged mental incompetency should be a basis for equitably tolling the one-year statutory limitation period. This rule conflicts with Opinions of this Court which hold that habeas proceedings should proceed through a next friend. Certiorari should be granted to resolve the conflict in this important area of law.

The en banc opinion has also expanded the doctrine of equitable tolling to allow evolving bases to be advanced in its support. This holding effectively does away with the one-year statutory limitation period of the AEDPA. New factual bases for equitable tolling should not be considered after the expiration of the one-year limitation period of the AEDPA.

ARGUMENT

I.

A FINAL JUDGMENT DISMISSING A HABEAS PROCEEDING FOR FAILURE TO COMPLY WITH THE ONE YEAR STATUTORY LIMITATIONS PERIOD OF AEDPA IS GOVERNED BY RE JUDICATA PRINCIPLES

In Calderon v. United States District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III), a three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled that the failure of Kelly to file a habeas petition within the one-year statutory limitations period of AEDPA precluded him from challenging his state court convictions by way of federal habeas corpus and that the proffered reasons for equitable tolling did not justify relief from the default.[2] A Petition for Rehearing and Suggestion For Rehearing En Banc was denied. A Petition for Writ of Certiorari was denied by this Court. In reliance on the finality of the federal challenges to the underlying convictions, a new execution date was set and an extensive five-week state court trial into Kelly's sanity for purposes of execution was held. In addition, the Governor of California conducted a clemency hearing in anticipation of the execution.

In Calderon v. Thompson, 118 S. Ct. at 1489, this Court held that the Court of Appeals abused its discretion in recalling the mandate and reconsidering a final judgment in a federal habeas corpus and stressed the

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2. In Kelly IV the panel acknowledged that additional claims could be presented if they met the requirements of 28 U.S.C § 2244(d)(1)(B) or (D). Slip Op. at 5.

importance of finality in habeas proceedings. Calderon v. Thompson, 118 S. Ct. at 1500-02. The action of the Court of Appeals in the present case is far more egregious than the manipulations in Thompson. Since it could not recall the mandate previously issued, the Court of Appeals held that it was not bound by the previous final judgement under the theory that res judicata does not apply to habeas corpus.[3] Slip Op. at 13524-25.

As the dissent to the en banc opinion correctly points out, the rule that res judicata does not apply to habeas corpus is not applicable since Kelly had not filed a habeas petition. Kelly V, Slip Op. at 13539. The res judicata effect sought by Warden Calderon was based on the Writ of Mandate granted by the Ninth Circuit, not a judgment in a habeas proceeding. There was a post-conviction proceeding pending that was dismissed pursuant to Kelly III, but it was not a habeas petition that was dismissed. It is correct that in the past res judicata has been held inapplicable to successive habeas petitions and that the propriety of filing additional petitions has been evaluated under an abuse of the writ analysis. McCleskey v. Zant, 499 U.S. 467, 479-83, 111 S. Ct. 1454 (1991). However, it was never claimed that Kelly abused the writ and thereby should be foreclosed from filing a subsequent petition. The argument was simply that he failed to meet a statutory limitation for filing a petition without justification and as a result he was foreclosed from

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3. This transparent attempt to avoid the final judgment and this Court's Opinion in Thompson should not be countenanced. The Ninth Circuit had no jurisdiction to reconsider the holding in Kelly III. The only issue pending before that court in Kelly IV and Kelly V was whether to order the district court to comply with the unequivocal ruling in Kelly III. The Petition for Writ of Mandamus filed by Warden Calderon was based primarily on this Court's strong message in Thompson to honor finality in habeas corpus proceedings. By failing to even acknowledge the Thompson opinion in the present case the Ninth Circuit has chosen to ignore its holding.

challenging his state court convictions. Even if the appointment of counsel in the District Court could be construed as some type of habeas proceeding this is not dispositive. As pointed out in Kelly V (Silverman conc., Slip Op. at 13536).

> By definition, a petition for writ of habeas corpus is a collateral attack on a final judgment. It is in that sense that res judicata does not apply to habeas corpus proceedings. That is a far cry from a rule of res judicata that prevents a habeas petitioner who has already litigated X in habeas proceedings from relitigating X in new habeas proceedings without good excuse.

In any event, the general rule that res judicata does not apply to habeas petitions has been abrogated by the AEDPA. Again, as noted in Kelly V (Slip Op. at 13534-35, Silverman conc.)

> When Congress amended S 2244 of the habeas corpus statute in 1966 (sic), it specifically stated that 'the purpose of these new subsections is to add to section 2244 of title 28, United States Code, provisions for a qualified application of the doctrine of res judicata.' S.Rep.No. 89-1797, at 2 (1966) (emphasis added). The Supreme Court has agreed. See Calderon v. Thompson, 118 S.Ct. 1489, 1500-1501 (1998). See also Schlup v. Delo, 513 U.S. 298, 318-19 (1995) (successive petition standard is a 'qualified application of res judicata'); Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996) ('the new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ"'); McCleskey v. Zant, 499 U.S. 467, 486 (1991) ('subparagraph (b) [to 28 U.S.C. S 2244]

> established a qualified application of res judicata').

Slip. Op. 13534-35.

It is clear and uncontested that the issuance of the Writ of Mandamus by the Ninth Circuit in Calderon v. U.S. District Court, 127 F.3d 782 (Kelly III) was a final order entitled to res judicata effect. The Ninth Circuit Court of Appeals had the opportunity to reconsider that decision but declined to order a rehearing en banc. This Court denied certiorari. In reliance on the finality of the federal proceedings an extensive trial into Kelly's sanity for purposes of execution was held. The Governor of California instituted and completed clemency proceedings due to the pending execution. The Court of Appeals lacked jurisdiction to reconsider the Writ of Mandamus which decided that Kelly was precluded from challenging his state court convictions due to his failure to meet the statutory deadline for filing a petition. Certiorari should be granted to review the Opinion below.

II.

THE FILING OF A REQUEST FOR COUNSEL UNDER 21 U.S.C. § 848 DOES NOT MAKE A CASE PENDING FOR THE PURPOSE OF DETERMINING IF THE AEDPA APPLIES

In Lindh v. Murphy, 519 U.S. 1074, 117 S. Ct. 2059, 2061 (1997) this Court ruled that the AEDPA was not to be applied retroactivly and did not apply to those cases which were pending on the effective date of the statute. Prior to the issuance of the present Opinion, every circuit of the United States Court of Appeals that had considered the issue has held that a request for counsel under § 848(q)(4)(B) did not make a case pending and that the AEDPA would apply to any case where a petition had not been filed by the effective date of the statute. See Holman v. Gilmore, 126 F.3d 876 (7th Cir. 1997), cert. denied 118 S. Ct. 1169; Williams v. Cain, 125 F.3d 269 (5th Cir. 1997), cert. denied 118 S. Ct. 2338; Nobles v. Johnson, 127 F.3d 409 (5th Cir. 1997), cert. denied 118 S. Ct. 1845; Calderon v. US District Court (Beeler), 128 F. 3d 1283 (9th Cir. 1997) cert. denied 118 S. Ct. 1389; Calderon v. U.S. District Court (Kelly III), 127 F.3d 782, cert. denied 118 S. Ct. 1395.

In overruling those portions of Beeler and Kelly III which agreed with the other circuits on this issue, the en banc court relied on this Court's recent opinion in Hohn v. United States, ___ U.S. ___, 118 S. Ct. 1969 (1998). Slip Op. at 13527-29. Hohn does not suggest or require that result.

In Hohn, this Court held that it had jurisdiction to review on Petition for Writ of Certiorari, a denial of an application for a certificate of appealability under the AEDPA by the Court of Appeals since the application

qualified as a "case" permitting review by way of certiorari. Hohn v. United States, 118 S. Ct. at 1972-78. That holding has no relationship to the question decided by the Court of Appeals. It is not questioned that the request for counsel under 21 U.S.C. § 848(q)(4)(B) gave the District Court limited jurisdiction which permitted the issuance of a stay of execution and the appointment of counsel. See McFarland v. Scott, 512 U.S. 849, 854-59, 114 S. Ct. 2568, (1994). In that regard, a post-conviction proceeding was pending which was the vehicle for Petitioner Calderon to move to dismiss the matter for failure to comply with the one-year limitation period and to petition for writ of mandate to the Court of Appeals. That proceeding also provided jurisdiction for Kelly to petition for writ of certiorari to this Court challenging the granting of the writ of mandate. This is, however, a far cry from holding that a request for the appointment of counsel makes a case pending for the purpose of determining the application of the AEDPA. As the dissent in Kelly V points out "the words may appear the same but their meanings are vastly different." Slip Op. at 13539-40.

In Hohn, this Court used the word "case" to decide whether it had jurisdiction. In Beeler and the other Court of Appeals rulings the word "case" was used to interpret whether a statute of limitations had run. Both this Court (Hohn, 118 S. Ct. at 1975) and the en banc Court of Appeals, Slip Op. at 13528-29, relied on Ex Parte Quirin, 317 U.S. 1 (1942) to support the holding. While Quirin may support this Court's conclusion, it is inapposite to that of the Court of Appeals.

> While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of

> the prisoner. *Walker* v. *Johnston*, 312 U.S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari.

Ex Parte Quirin, 317 U.S. at 24, emphasis added.

Neither McFarland, Lindh nor Hohn was decided with the present problem in mind. Although decided prior to Hohn, both the Seventh and Fifth Circuit Courts of Appeals declined to torture the language of this Court's opinions to obtain the result reached by the Ninth Circuit. Holman v. Gilmore, 126 F.3d 876, 879-80; Williams v. Cain, 125 F.3d 269, 273-74.

Also, as a practical matter, it is clear that Congress did not intend the convoluted results reached by the en banc court. The AEDPA represents an extensively debated response to an abiding public outrage over endless delays in habeas corpus litigation. The purpose of the habeas reform found in the AEDPA was

> to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.

U.S. Code Cong. & Admn. News, 104th Cong. 2nd Sess. at 944 (1996) (House Conf. Rpt. 104-518 at 111). The Ninth Circuit in Kelly III correctly ruled based on Congressional intent:

> Were there any doubt [that "cases pending" means the petition has been filed], it is dispelled by Congress's obvious intent to ""halt the unacceptable delay which has developed in the federal habeas process."" [citing Beeler, 128 F.3d at 1288-1289.] . . . The rule [that a request for

> appointment of counsel removes a case from the AEDPA's requirements] would seriously undercut Congress's purpose. . . . If a mere appointment of counsel in what amounts to a proceeding ancillary to a true habeas corpus application can avoid the one-year statute of limitations, the Act will not have been very effective at all.

Calderon v. United States District Court (Kelly III), 127 F.3d at 785. The above logic remains intact and was not obviated by the unrelated discussion of "cases" in Hohn.

The term "cases pending" or "filed" should not be defined by isolated terms in the Act or cases addressing different legal issues. To discern the intent of Congress, the focus should be on determining at what point in a case the law would impair the substantive rights of a party who acted in reliance upon the law, so as to avoid any retroactive effect on a case. Landgraf v. U.S.I. Film Products, 511 U.S. 244, 280 (1994); Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1407-08 (9th Cir. 1995), cert. denied, 517 U.S. 1104 (1996).

In requesting appointment of counsel, Kelly was not relying on the law as it existed prior to the Act in making his request for appointment of counsel. Kelly could not have made his request for appointment of counsel in any way which could have been affected by the subsequent enactment of the AEDPA. The Act attached no legal consequences to this event, completed before the enactment of the Act. Indeed, Kelly was on notice since the Ninth Circuit had already ruled in Beeler on April 17, 1997, (Amended October 29, 1997) that the filing of a request for counsel did not make a case pending in determining the applicability of the AEDPA.

Hence, a request for appointment of counsel would not cause a case to be pending for purposes of the Act in Kelly's case. If a request for appointment of counsel caused a "case" to be "pending" with respect to the

question of retroactivity, the cases of death-row inmates who requested appointment of counsel prior to April 24, 1996, would alone receive an advantage over the cases of non-indigent inmates who retained counsel or had no counsel and also of all inmates in noncapital cases. Congress could not have intended such unequal treatment. In those cases where counsel may be appointed, fortuity as to when and if a request for appointed counsel could be made, and not valid settled expectations, would determine whether the Act would apply. The Ninth Circuit noted in Beeler this potential anomaly:

> A prisoner who had not requested counsel before April 24, 1996, would certainly have to apply for a writ within the limitations period. We merely hold that those provisions apply equally to prisoners who had requested counsel but not applied for a writ as of April 24, 1996.

Calderon v. United States District Court (Beeler), 128 F.3d at 1287, n.3. This logic was not changed by the decision in Hohn.

Thus, the Ninth Circuit's new holding does not give "meaning to the statute as a practical matter." See McFarland v. Scott, 512 U.S. at 855. Neither logic nor this Court's opinion in Hohn supports the conclusion that because Kelly requested appointment of counsel prior to the effective date of the Act, his case must be deemed pending and not subject to the Act.

The most meaningful and plausible starting point of a habeas case for purposes of determining when a case is pending is upon the filing of the habeas petition. The Ninth Circuit and Seventh Circuit Courts of Appeals specifically noted the appropriateness of Federal Rules of Civil Procedure, rule 3, which codifies this as a starting point. Calderon v. United States District Court (Beeler), 128 F.3d at 1287, n.3; Holman v. Gilmore, 126 F.3d at 880. It is the point at which a capital case, for either an

indigent and non-indigent petitioner, and a noncapital case commences. Thus, it is the fair and objective starting point for all cases. It is also the point at which a defendant will act with conscious regard to the law, presenting a petition in accordance with the requirements established by the Act.

The Courts of Appeals of various Circuits have found that the naturally understood and logical meaning of "cases pending" is cases where the habeas petition has been filed.

> The obvious approach, of course, is that a habeas petition is 'pending' only after a petition for writ of habeas corpus itself is filed.

Williams v. Cain, 125 F.3d at 274.

> Nothing in the AEDPA defines the set of 'cases' to which the effective-date rules apply, but the most logical definition is the universe of cases otherwise covered by [Chapter 153 and Chapter 154]--which is to say, a collateral attack on a criminal judgment. Prisoners may file many other kinds of suits, . . . but it would not be a sensible reading of the effective-date . . . to say that every species of prisoner litigation is a "case pending" for its purpose. A motion under § 848(q)(4) for appointment of counsel . . . is not itself a collateral attack.

Holman v. Gilmore, 126 F.3d at 879.

The Court of Appeals in Holman found, moreover, that a motion under 21 U.S.C. § 848(q)(4)(B) was "outside the rationale of Lindh." Id. at 880.

The Ninth Circuit's interpretation of the term "cases pending" requires a strained and illogical reading of the Act and case law concerning the Act. In an attempt to evade the requirements of the AEDPA, the Ninth

Circuit must defy the naturally understood meaning of the term as used by Congress and the courts regarding the applicability of the AEDPA. Not only does such interpretation rely on irrelevant definitions and assumptions concerning the use of the term "cases pending," it also lacks a logical and meaningful basis. A case should not be deemed pending upon simply a request for an appointment of counsel where no legal consequence of the AEDPA has yet attached.[4]

It seems clear that the Ninth Circuit has contorted the AEDPA and abandoned its prior opinion solely to provide relief to this Petitioner.

The Ninth Circuit was initially correct in ruling that a case is not pending under the AEDPA for purposes of retroactivity if a habeas petition was not filed prior to the effective date of the Act. The Courts of Appeals in, Nobles, Williams, and Holman, reached the same correct conclusion, each citing and emphasizing valid bases for their decision. Consistently the courts have found that the McFarland holding is inapplicable, and that the obvious and logical meaning of "cases pending" is that a habeas petition, not merely a request for counsel, must have been filed prior to the enactment of the AEDPA. Although not controlling, it should also be noted that this Court denied certiorari in all of the above cases while Hohn was pending.

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4. Even assuming the Court in Kelly V was correct in ruling that the filing of a request for counsel made a case pending within the meaning of Lindh, Kelly should not be affected. Since the underlying case was dismissed pursuant to the order of the Ninth Circuit in Kelly III any new filing would come within the requirements of the AEDPA. The attempt in Kelly V to ignore this fact by saying Kelly III was a mistake (Slip Op. at 13532-33) is as egregious as trying to avoid this result by recalling the mandate on the basis of a judicial mistake. See Calderon v. Thompson, 118 S. Ct. at 1502.

Certiorari should be granted to resolve this important issue of law due to the conflict created by the Ninth Circuit.

III.

THE ALLEGED INABILITY OF A HABEAS PETITIONER TO ASSIST COUNSEL IS NOT A PROPER BASIS FOR EQUITABLY TOLLING THE STATUTORY LIMITATION PERIOD

In a gratuitous holding[5/] the court in Kelly V ruled that Kelly's alleged inability to assist counsel justifies equitable tolling, at least until a reasonable period of time has elapsed after the District Court makes a competency determination. Slip Op. at 13532. This holding is contrary to binding authority of this Court and paves the way for an open-ended stay of proceedings in a host of causes. Kelly has already delayed the federal habeas proceedings for almost seven years on the basis of his claim that his inability to assist counsel prevented his counsel from filing habeas petitions. To now suggest that he is entitled to an additional "reasonable period" of equitable tolling makes a mockery of the limitations period.

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5. There has never been a request for equitable tolling of the statutory limitation period for a finite period of time due to Kelly's alleged inability to assist counsel. A request was made in the District Court for an indefinite stay of the proceedings until Kelly was able to assist counsel. Interestingly, counsel appointed for Kelly consistently claimed over a period of five years that they were unable to file a petition due to his inability to communicate. Following the dismissal of the proceedings pursuant to the writ of mandamus in Kelly III, the federal public defender, who had no authority to represent Kelly, was able to file two habeas petitions totalling 1478 pages with 6171 pages of exhibits on the same day the decision in Kelly III became final. It was improper to even consider the issue of equitable tolling in Kelly V since it was not raised by the Petition for Writ of Mandamus before the court. It was necessary for the en banc court to reconsider the final decision in Kelly III to reach the issue.

Although this Court has never ruled on the availability of equitable tolling to avoid the statutory limitation period of the AEDPA, the Ninth Circuit has held it is available in extraordinary circumstances. Calderon v. U.S. Dist. Ct. (Beeler), 128 F.3d at 1288.

Unlike a defendant in a criminal trial, a habeas corpus petitioner has no right, whether by virtue of statute or constitutional interpretation, to be competent to assist his post-conviction counsel. Thus, even if Kelly has become incompetent after he was previously found to be competent to stand trial (and to be executed), the post-conviction proceedings need not be stayed or otherwise interrupted.

A. There Is No Constitutional Right To Be Competent During The Pendency Of Post-Conviction Proceedings

The Due Process Clause of the Fourteenth Amendment prohibits the trial of a defendant who is not competent to consult with his attorney and understand the proceedings against him. Drope v. Missouri, 420 U.S. 162, 172 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966). No case has been discovered that has expanded this constitutional right to be competent to stand trial into a right to be competent after a final judgment has been obtained and during the pendency of post-conviction collateral challenges. In fact, the cases outlining Petitioners' rights in raising collateral challenges dictate that the right to be competent should not be extended to such post-trial proceedings.

The right to be competent at trial is a fundamental element of an adversary system of justice. Drope v. Missouri, 420 U.S. at 172. As noted by Blackstone, an incompetent person is neither able to enter a plea with advice and caution, nor make his defense if

the matter proceeds to trial. Drope v. Missouri, 420 U.S. at 171 (quoting 4 W. Blackstone Commentaries, *24). More contemporary commentators have alternatively ascribed the basis of the right as being a by-product of the ban against trials in absentia. Id. (citing Foote, A Comment on Pre-trial Commitment of Criminal Defendants, 108 U. PA. L. REV. 832, 834 (1960)).

The differences between trial and a post-conviction challenge to a final judgment militate against transforming the right to competency at trial into the right to be competent during the pendency of a habeas corpus petition. Unlike a defendant who becomes incompetent prior to trial, a habeas corpus petitioner has already pleaded not guilty, made a defense, consulted with counsel, and been present during trial. Moreover, after a final judgment has been reached and affirmed by the state courts, the very nature of the proceedings in the context of a federal habeas corpus petition changes from that of a criminal trial. A habeas corpus proceeding is not part of the criminal process, and is in fact civil in nature. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). The accused is no longer presumed innocent, and instead a presumption of correctness attaches to the state court judgment. Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

As a result of such differences between a criminal trial and a collateral attack on a judgment, courts have declined to extend to habeas corpus petitioners the same fundamental rights that are guaranteed to criminal defendants. Thus, for instance, this Court has held that there is no constitutional right to counsel in state post-conviction or federal habeas corpus proceedings. Coleman v. Thompson, 501 U.S. 722, 756-57, 111 S. Ct. 2546, 2566 (1991); McCleskey v. Zant, 499 U.S. at 495, 111 S. Ct. at 1471; Pennsylvania v. Finley, 481 U.S. at 555. Further, because there is no right to counsel, a petitioner cannot claim that his post-conviction counsel was ineffective. Coleman v. Thompson, 111 S. Ct. at 2566.

In concluding that a petitioner seeking post-conviction relief has no right to effective assistance of counsel, this Court has noted that even a pro se petitioner is able to obtain meaningful access to the courts in post-conviction proceedings by virtue of the trial record, appellate briefs, and opinions that already exist. Pennsylvania v. Finley, 481 U.S. at 557. Significantly, the court reached this conclusion even though a writ for post-conviction relief may entail developing a factual record that had not been previously presented to a court.

The reasoning of these decisions dictates the result in the present case. If Kelly cannot claim a constitutional right to effective assistance of counsel, then he cannot claim that his inability to communicate with his counsel as a result of his alleged incompetency somehow violates a right to fundamental fairness.

Because there is a final judgment in place, preventing a habeas corpus petitioner from proceeding based upon a finding of incompetence would infringe not only upon the State's interests, but also upon the petitioner's interests as well. As the California Supreme Court concluded in In re Kemp, 1 Cal. 3d 190, 192, n.1, 81 Cal. Rptr. 609, 460 P.2d 481 (1969), the determination of a petitioner's sanity has "no effect" upon habeas corpus proceedings because

> Even if found to be insane . . . [the petitioner] should be able to test the validity of his conviction and not be forced to remain in a mental institution under a threat of a judgment imposing the death penalty.

Although the right to be competent to stand trial has existed since the early common law, apparently no court has extended this right to petitioners seeking post-conviction relief. In fact, both this Court and the Ninth Circuit have tacitly concluded that there is no right to be competent while seeking post-conviction relief. In

Whitmore v. Arkansas, 495 U.S. 149, 163 (1990), the Court held that in order to have standing to pursue a habeas corpus petition as a next friend, the next friend must first show, inter alia, that the real party in interest is "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." The Court did not conclude that collateral relief must be held in abeyance until the petitioner regains his competency.[6] In fact, such a conclusion would have been inconsistent with the requirements for standing to act as a next friend.

Previously the Ninth Circuit has also implicitly concluded that there is no constitutional right to be competent during habeas corpus proceedings. In Calderon v. Wade, 29 F.3d 1312, 1326, n.11 (9th Cir. 1994), cert. denied, 513 U.S. 1120 (1995), the court found no abuse of discretion when the District Court denied habeas counsel's request to determine whether the petitioner was competent to assist counsel. In so ruling, the court remarked that it failed to understand the need for such a finding of incompetence, noting that the petitioner was not attempting to waive any rights to proceed by habeas corpus. Id. Cf. Rees v. Peyton, 384 U.S. 312, 313-14, 86 S. Ct. 1505, 1506-07 (1966). The court further observed that the statutory right to be competent applies only during a criminal trial. Calderon v. Wade, 29 F.3d at 1326, n.11. See also In re Cockrum, 867 F. Supp. 484, 494 (E.D. Tex. 1994) (court found habeas petitioner incompetent to waive petition, and

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6. Indeed, Justice Brennen's dissent in Whitmore explicitly recognized that in the event a defendant becomes incompetent, a court would be required to appoint someone to represent him. Whitmore v. Arkansas, 495 U.S. 177, n.4 (citing Franz v. Lockhart, 700 F. Supp. 1005, 1011, n.2 (E.D. Ark. 1988). Kelly was represented by a next friend, his mother, prior to the dismissal of proceedings in federal court.

therefore concluded that substantive issues should be resolved).

Because of the significant difference between a criminal trial and post-conviction review of a final judgment, there is no basis for extending the right to be competent to a petitioner seeking habeas corpus relief. Thus, the present proceedings should continue without further delay regardless of whether Kelly is or is not incompetent.

B. There Is No Statutory Right To Be Competent During Post-Conviction Proceedings

There is neither a federal nor state statutory right to be competent in any proceeding after sentence has been imposed. The respective federal and state rights to be competent at trial are codified at 18 U.S.C. § 4241 and California Penal Code §§ 1367 and 1368. Significantly, each of these provisions emphasizes that such a right is not extended after a judgment has been entered. See 18 U.S.C. § 4241; Cal. Penal Code § 1368; People v. Kelly, 1 Cal. 4th at 544. Neither of these provisions could be said to extend the right to be competent to post-conviction proceedings. Calderon v. Wade, 29 F.3d at 1326, n.11; People v. Kelly, 1 Cal. 4th at 544. Accordingly, there is no legislative basis for staying or otherwise delaying the present proceedings.

The decision of the Court of Appeals below is inconsistent with prior holdings of this Court dealing with the ability to assist counsel on habeas corpus. Certiorari should be granted to consider this important question of law.

IV.

THE GRANTING OF EQUITABLE TOLLING ON A THEORY NOT INITIALLY ADVANCED AND NOT PRESENTED UNTIL AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED WAS A GROSS ABUSE OF DISCRETION

As noted earlier, although this Court has not ruled on the applicability of equitable tolling to the AEDPA, the Ninth Circuit has previously held that it would not be available in most cases but only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. Calderon v. US Dist. Ct (Beeler), 128 F.3d at 1288-89. While terming this a "high hurdle," id., the present case demonstrates that in reality any excuse will suffice. In fact, the present opinion suggests that equitable tolling will now be almost routine in death penalty cases, so much so that the remedy of mandamus will not be available to challenge it. Slip Op. 13518-19. The opinion would appear to invite district courts to delay as much as they choose knowing that the Ninth Circuit will not intervene.

As the record below shows, prior to the expiration of the one-year statutory limitation period on April 23, 1997, counsel for Kelly presented only one suggested justification, that due to his inability to communicate the statute should be tolled indefinitely. The District Court did not rule on this request but simply held that the AEDPA was inapplicable to Kelly. Pursuant to Warden Caldron's Petition for Writ of Mandate the Ninth Circuit, in Kelly III, ordered the proceedings dismissed for failing to meet the statutory deadline or present any satisfactory justification for failing to do so. At no time in the District Court, during the briefing in

Kelly III or oral argument did counsel for Kelly claim they had not filed a timely petition due to their belief that a prior order of the District Court precluded them from doing so. The issue first arose when the dissent in Kelly III suggested that such an interpretation of the order could be made. However, that purported justification was rejected when presented by way of a Petition for Rehearing and Suggestion for Rehearing En Banc.

After the proceedings were dismissed, execution dates were set, a sanity hearing conducted, a clemency hearing held and subsequent habeas petitions denied by the California Supreme Court, the District Court allowed new petitions to be filed and on June 3, 1998, granted equitable tolling on the basis of a claim that a prior order of the District Court was a proper basis for equitably tolling the statutory limitations period.[7] As pointed out in Kelly III, Silverman conc. (Slip Op. at 13536-67) Kelly should be barred from presenting belated reasons for equitable tolling, at least in the absence of a showing of cause and prejudice or manifest injustice.

Certiorari should be granted to consider the question of whether equitable tolling may be granted after the expiration of the statutory limitation period and if so, on what basis.

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7. The opinion below fails to explain how an order by the District Court on June 9, 1995, well prior to the effective date of the AEDPA of April 24, 1996, could have the effect of absolving Kelly from compliance from the statute.

CONCLUSION

Accordingly, this Court should issue a writ of certiorari and hold that: 1) a final judgment dismissing a case for failing to comply with the one-year statutory limitations period of the AEDPA is subject to res judicata; 2) the appointment of counsel pursuant to 21 U.S.C. § 848 does not make a case pending within the meaning of Lindh for purposes of determining the application of the AEDPA, 3) the inability to assist counsel is not a valid justification for failing to meet the statutory deadline of the AEDPA and 4) after the expiration of the statutory limitations period of the AEDPA equitable tolling may not be granted.

Dated: December 30, 1998.

Respectfully submitted,

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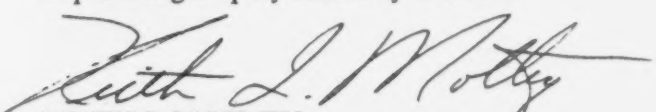

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(2)

Supreme Court, U.S.
FILED

No. 981082 JAN 4 1999

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARTHUR CALDERON, Warden, *Petitioner*,

v.

HORACE EDWARDS KELLY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

APPENDIX 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HORACE EDWARDS KELLY, Petitioner

v.

DANIEL VASQUEZ, etc., Respondent

Order - filed June 17, 1997

Case Nos. CV 93-2951 TJH and CV 92-5420 TJH

The Court has considered Respondent's motion to dismiss and vacate the stays of execution and Petitioner's motion to avoid the petition filing deadline, to determine the applicability of the Antiterrorism and Effective Death Penalty Act of 1996, for sanity hearing, and for an indefinite stay of execution, together with the moving papers.

It is Ordered that Respondent's motion to dismiss and vacate the stays of execution be, and hereby is, Denied.

It is further Ordered that the filing deadlines of the Antiterrorism and Effective Death Penalty Act of 1996 do not apply to this case.

It is further Ordered that Petitioner's motion for a sanity hearing shall be deemed a motion for a competency hearing.

It is further Ordered that Petitioner's motion for a competency hearing be, and hereby is Granted.

It is further Ordered that the competency hearing shall be held at 9:30 a.m. on Friday, October 10, 1997, at San Quentin State Prison.

It is further Ordered that Dr. David Kessler shall appear at the competency hearing as the Court's expert.

Date: June 17, 1997

/s/
Terry J. Hatter, Jr.
United States District Judge

APPENDIX 2

APPENDIX 2

Arthur CALDERON, Warden, Warden of California State Prison at San Quentin,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

Horace Edwards Kelly, Real Party in Interest.

No. 97-70785.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 5, 1997.

Decided Sept. 18, 1997.

After the United States District Court for the Central District of California denied state's motion to dismiss state inmate's pre-habeas petition proceedings, state sought writ of mandamus. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) statute of limitations under Antiterrorism and Effective Death Penalty Act (AEDPA) was applicable despite inmate's pre-AEDPA request for counsel, and (2) statute of limitations was not tolled by inmate's alleged mental incompetence.

Granted.

Tashima, Circuit Judge, dissented in part and filed opinion.

[1] MANDAMUS k4(1)
250k4(1)
Upon request to issue writ of mandamus in habeas corpus action, Court of Appeals considers whether party seeking writ has no other adequate means, such as direct appeal, to attain relief he desires, whether petitioner will be damaged or prejudiced in way that is not correctable on appeal, whether district court's order is clearly erroneous as matter of law, whether district court's order is oft repeated error or manifests persistent disregard for federal rules, and whether district court's order raises new and important problems or issues of law of first impression.

[1] MANDAMUS k60
250k60
Upon request to issue writ of mandamus in habeas corpus action, Court of Appeals considers whether party seeking writ has no other adequate means, such as direct appeal, to attain relief he desires, whether petitioner will be damaged or prejudiced in way that is not correctable on appeal, whether district court's order is clearly erroneous as matter of law, whether district court's order is oft repeated error or manifests persistent disregard for federal rules, and whether district court's order raises new and important problems or issues of law of first impression.

[2] HABEAS CORPUS k205
197k205
Any application by state inmate for habeas corpus would be subject to one-year statute of limitations for filing such applications, under Antiterrorism and Effective Death Penalty Act (AEDPA), even though inmate requested

counsel to assist with application for habeas corpus prior to AEDPA's effective date. 28 U.S.C.A. § 2244(d)(1)(A).

[3] HABEAS CORPUS k603
197k603
One-year statute of limitations for filing habeas corpus applications, under Antiterrorism and Effective Death Penalty Act (AEDPA), was not tolled by state inmate's alleged mental incompetence. 28 U.S.C.A. § 2244(d)(1)(A).

***782** Keith I. Motley, Deputy Attorney General, San Diego, CA, for petitioner and respondent.

Eugene R. Grace, Grace, Genson, Cosgrove & Schirm, Los Angeles, CA, and Richard C. Neuhoff, San Francisco, CA, for Real Party in Interest.

Petition for a Writ of Mandamus to the United States District Court for the Central District of California. D.C. Nos. CV-92-05420-TJH, CV-93-02951-TJH.

Before: HALL, FERNANDEZ, and TASHIMA, Circuit Judges.

FERNANDEZ, Circuit Judge:

The State of California, through the Warden of the California State Prison at San Quentin, moved to dismiss the proceedings in the United States District Court, which were filed on behalf of Horace Edwards Kelly. ***783** The State claimed that the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations for filing applications for a writ of habeas corpus precluded the continuance of the proceedings. See 28 U.S.C. § 2244(d)(1). The district court declared that the filing deadlines of the AEDPA did not apply to this matter and

denied the motion. This petition for a writ of mandamus followed. We agree with the State and order the writ to issue.

BACKGROUND

Way over ten years ago, Kelly murdered three people in three separate incidents. On November 16, 1984, he slew Sonia Reed in San Bernardino County, California, and he followed up that deed by slaying Ursula Houser on November 17, 1984, in the same county. He then shifted his facinorous operations, and on November 22, 1984, he took the life of an eleven-year-old boy, Danny O., in Riverside County, California. He was convicted and sentenced to death for Danny O.'s murder, and on November 26, 1990, the conviction and sentence was upheld by the California Supreme Court. See People v. Kelly, 51 Cal.3d 931, 800 P.2d 516, 275 Cal.Rptr. 160 (1990), cert. denied, 502 U.S. 842, 112 S.Ct. 134, 116 L.Ed.2d 101 (1991) (Kelly I). He was also convicted and sentenced to death for the murders of Sonia Reed and Ursula Houser, and on January 16, 1992, that conviction and sentence was upheld by the California Supreme Court. See People v. Kelly, 1 Cal.4th 495, 822 P.2d 385, 3 Cal.Rptr.2d 677, cert. denied, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992) (Kelly II). He did not seek further relief in the state court system, and that is where his federal court saga begins.

A didactic saga it is. Kelly has never filed an application or petition for habeas corpus relief in the federal courts and has never, therefore, stated any colorable grounds for the issuance of the Great Writ. Rather, he has been permitted to take advantage of a judicially created rule which enables an allegedly prospective federal habeas corpus petitioner to start a "proceeding" for the purpose of obtaining federally appointed counsel before any application or petition for habeas corpus is filed. That proceeding then allows the district court to "enter a stay of execution" on the theory that a petitioner has the right to counsel, and "the right to counsel necessarily includes

a right for that counsel meaningfully to research and present a defendant's habeas claims." McFarland v. Scott, 512 U.S. 849, 858, 114 S.Ct. 2568, 2573, 129 L.Ed.2d 666 (1994); see also Brown v. Vasquez, 952 F.2d 1164, 1168-69 (9th Cir.1992).

It should be observed that, in McFarland, four justices expressed disquiet at the fact that state proceedings could be interfered with and stayed before a defendant was even required to present a colorable claim to the federal courts. See McFarland, 512 U.S. at 860-61, 114 S.Ct. at 2574-75 (O'Connor, J., concurring and dissenting); id. at 873, 114 S.Ct. at 2581 (Thomas, J., joined by Rehnquist, C.J. and Scalia, J., dissenting). That is precisely what has happened here, but this case adds still another dimension to the problem, interminable delay.

On September 8, 1992, the district court granted a stay of Kelly's execution for the murder of Danny O., so that counsel could be appointed for him. Counsel was appointed January 15, 1993. Then, on June 4, 1993, the district court granted a stay of Kelly's execution for the murders of Sonia Reed and Ursula Houser and appointed counsel. Now, more than four years after the grants of those stays, there still has been no filing of a habeas corpus application, and there would be no end in sight unless the AEDPA has brought the proceedings to a close. There have, however, been other orders issued. On January 9, 1995, the district court appointed a psychiatrist to evaluate Kelly's present mental condition. Of course, Kelly's mental condition has been an issue since the beginning of the state proceedings against him. See, e.g., Kelly II, 1 Cal.4th at 514, 541, 543, 822 P.2d at 392, 411, 412, 3 Cal.Rptr.2d at 684-85, 703, 704; Kelly I, 51 Cal.3d at 944, 800 P.2d at 523, 275 Cal.Rptr. at 167. Then on January 5, 1996, the district court appointed a "next friend" to bring a habeas corpus petition on Kelly's behalf.

That is another method for assuring that a defendant obtains prompt review of federal constitutional *784 questions on habeas corpus. See Whitmore v. Arkansas, 495 U.S. 149, 161-64, 110 S.Ct. 1717, 1726-28, 109 L.Ed.2d 135 (1990). Still, no habeas corpus application or petition was filed.

The AEDPA was enacted April 24, 1996, and it, as relevant here, provided that an application for a writ of habeas corpus must be filed within one year of "the date on which the [state court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). It is clear that we are now far beyond that one-year period, but we have held that, in justice, the one year would not begin to run until the date the AEDPA was enacted. See Calderon v. United States Dist. Court (Beeler), 112 F.3d 386, 389 (9th Cir.1997). That year has passed. Still, no application for habeas corpus has been filed.

Faced with the delay, and with no end in sight, the State filed a motion to dismiss both proceedings and to vacate the stays of execution because the one- year statute of limitations had passed. The district court, without revealing its reasoning, declared that the AEDPA's filing deadlines do not apply to this matter. This petition for a writ of mandamus followed.

DISCUSSION

[1] When we are asked to issue a writ of mandamus in a habeas corpus action, we apply the guidelines articulated and discussed in Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir.1977). Those are:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires;

(2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
(3) whether the district court's order is clearly erroneous as a matter of law;
(4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and
(5) whether the district court's order raises new and important problems or issues of law of first impression.

Beeler, 112 F.3d at 388 (citations omitted). Of course, we have recognized that these are guidelines, that they "do not always result in bright-line distinctions," and that a decision "will often require a balancing of conflicting indicators." Bauman, 557 F.2d at 655. Nevertheless, as we have said, "[a]lthough all five factors need not be satisfied, 'it is clear that the third factor, the existence of clear error as a matter of law, is dispositive.'" Calderon v. United States Dist. Court (Nicolaus), 98 F.3d 1102, 1105 (9th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 1830, 137 L.Ed.2d 1036 (1997) (citation omitted); see also Calderon v. United States Dist. Court (Hayes), 103 F.3d 72, 74 (9th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 2532, 138 L.Ed.2d 1031 (1997).

Here at least most of the guidelines point toward the propriety of issuing the writ. The first because it is plain that if the writ is not issued, the State will be forced to await the outcome of proceedings which should not go forward at all, and which may well extend the four to five years' delay much further. Indeed, they probably will do so, considering the fact that the only excuse for not having filed an application or petition for a writ of habeas corpus is said to be Kelly's mental state, an issue which has been around for over ten years.

The second is satisfied because the very harm the State will suffer is an even longer interference in its proceedings

without the benefit of a habeas corpus application to explicate any alleged federal claims.

The fourth guideline does not clearly point in favor of issuing the writ because we are not in a position to say that the error in question is oft repeated. However, that segues into the fifth guideline because the issue of the proper application of the AEDPA is exceedingly important and is one of first impression. It must be answered promptly lest errors and disruptions of state proceedings proliferate. Also, other petitioners may be misled as to their rights. See Beeler, 112 F.3d at 388.

*785 On balance, the third guideline will, indeed, be dispositive. Thus, we turn to the merits of the State's position regarding the AEDPA.

A. Statute of Limitations

[2] The State's position is simple and direct. It points to the statute, which clearly requires that the "application for a writ of habeas corpus" must be filed during the one-year statute of limitations period. 28 U.S.C. § 2244(d)(1)(A). The statute does not say that a request for counsel must be filed during that time; it requires the filing of the application itself. It is abundantly clear that no application for habeas corpus has ever been filed in these matters. No doubt some sort of proceedings, which might ultimately have led to applications, were on file. But a mere possibility that a habeas corpus application will be filed is far from being the habeas corpus application itself.

We made that clear when we declared that even after counsel had been appointed and a stay had been entered, the defendant had no right to obtain discovery. That was not available before the habeas corpus application (or petition) was itself filed. See Nicolaus, 98 F.3d at 1108.

In Nicolaus, we outlined many of the separate concerns that make pre-application proceedings different from the habeas corpus case itself. Among other things, there is not even an inkling that there is any valid ground for filing a habeas corpus application before one is filed. Id. at 1106. In the context of this proceeding, for example, matters have dragged on with no articulated basis for having the federal court involved.

But, says Kelly, despite the clear language of § 2244(d)(1), the AEDPA does not apply at all because it only applies to cases filed after April 24, 1996, and his case was filed before that date. We disagree. As we have said, the AEDPA applies to defendants who "did not have a federal habeas petition pending at the time AEDPA was signed into law." Beeler, 112 F.3d at 390 n. 3.

Kelly does get some succor from statements in cases which did not focus on the distinction between situations where an application or petition was pending and those where one was not. Thus, when we determined the retroactivity of the AEDPA we did repeatedly refer to the issue as involving one of "pending cases." Jeffries v. Wood, 114 F.3d 1484, 1493-98 (9th Cir.1997) (en banc) (emphasis added). In stating our conclusion, we declared that the Act, as relevant here, did not apply to "cases filed in the federal courts of this Circuit prior to the Act's effective date." Id. at 1499. Kelly, of course, now argues that his case was so filed. But he ignores our illumination of what we meant, which appears in the very next sentence: "Because Jeffries' habeas petition was filed prior to April 24, 1996, the Act does not apply to his case." Id. (emphasis added). Just so, but Kelly has never filed a petition or application.

Kelly also points to the Supreme Court's decision in Lindh v. Murphy, --- U.S. ----, 117 S.Ct. 2059, 138 L.Ed.2d 481

(1997), but that case offers him precious little help. That is because the Court framed the issue before it as "whether that new section of the statute [2254(d)] dealing with petitions for habeas corpus governs applications in non-capital cases that were already pending when the Act was passed." Id. at ----, 117 S.Ct. at 2061 (emphasis added). Lindh had filed his application for the writ long before the effective date of the Act. Thus, the provisions did not apply to him. Again, while the court repeatedly referred to "cases," the context of that reference was matters where a habeas corpus application was on file.

Were there any doubt about this reading, it is dispelled by Congress's obvious intent to "'halt the unacceptable delay which has developed in the federal habeas process.'" Beeler, 112 F.3d at 391. Whether one believes that the delay is unacceptable, or not, the rule argued for by Kelly would seriously undercut Congress's purpose, as this matter itself illustrates. Over four years after he first obtained stays from the district court, Kelly has yet to present any application for habeas corpus to that court. If a mere appointment of counsel in what amounts to a proceeding ancillary to a true habeas corpus application can avoid the one-year statute of limitations, the Act will not have been very effective at all.

***786** B. Tolling

[3] Kelly argues that even if the AEDPA does apply, he is entitled to tolling of the one-year provision. We have held that equitable tolling will be available when "'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." Beeler, 112 F.3d at 391; see also Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir.1996); Scholar v. Pacific Bell, 963 F.2d 264, 267-68 (9th Cir.), cert. denied, 506 U.S. 868, 113 S.Ct. 196, 121 L.Ed.2d 139 (1992).

Kelly asserts that he is not mentally competent and cannot, therefore, aid his attorney. Thus, he argues, he not only is entitled to tolling but also is entitled to have the stays imposed by the district court continued indefinitely. He cites no authority for that interesting assertion, and on the facts of these proceedings we reject it as a matter of law. When Kelly was before the California Supreme Court, he made the same argument in an attempt to forestall the whole state appellate process. That court responded:

Defendant contends that his right to "meaningful appellate review" and right to the effective assistance of counsel under the state and federal Constitutions preclude proceeding with the appeal if he is incompetent. We disagree. The United States Supreme Court has not specifically decided this question, but has done so by implication. In Whitmore v. Arkansas (1990), 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 ..., the high court held that a person has standing to bring a "next friend" challenge to a judgment of death only in limited circumstances. A "next friend" must show "that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." (Id. at p. 165 [110 S.Ct. at p. 1728] ..., italics added.) The emphasized language implies that mental incompetence, although a basis for allowing "next friend" standing to challenge the judgment, does not require cessation of postjudgment proceedings. Here, of course, "next friend" status is unnecessary, since defendant is fully represented by counsel who can protect his interests.

....

The considerations that prohibit an incompetent person from being tried ..., do not apply after the judgment. The issues on appeal are limited to the appellate record. An appeal involves only legal issues based on that record. Attorneys do not need to rely on the defendant himself to decide what issues are worthy of pursuit.

Kelly II, 1 Cal.4th at 545-46, 822 P.2d at 413-14, 3 Cal.Rptr.2d at 705-06 (citations omitted). We fully agree. Here, too, Kelly has had counsel to represent him for a long time, and even has a next friend. The Supreme Court could hardly have contemplated that all post-conviction proceedings would be stayed because a defendant was not competent, when it endorsed the concept which allows "'next friends' [to] appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." Whitmore v. Arkansas, 495 U.S. at 162, 110 S.Ct. at 1726. Nor is Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), on which Kelly relies, to the contrary. The Court merely retained jurisdiction over an already filed petition until it could be determined whether the petitioner was competent to withdraw the petition. Id. at 314, 86 S.Ct. at 1506-07. The Court did not suggest that any ensuing determination of incompetence would stay action on the merits of that petition.

While we do not foreclose the possibility that some particular difficulties could require tolling in some instances, this is not one of them. This matter stands in essentially the same posture that it stood in when it was before the California Supreme Court. Because once his direct appeals were decided Kelly did not request any further relief from the California courts, he cannot, generally speaking, pursue any issues in the federal courts which were not before the California Supreme Court when it decided those appeals. Any other purported claims would be unexhausted. See Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995); Picard v. Connor, 404 U.S. 270, ***787** 277-78, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971) [FN1]. Kelly is simply attempting to obtain from the federal courts, by indirection, the very relief he was denied on direct appeal

in California. He seeks to put off any decision whatever on the merits of his claims, if any. That he cannot do under the guise of tolling or otherwise. [FN2] As it is, he has injected a long, fruitless delay into the state proceedings. The AEDPA has, however, brought that delay to an end.

> FN1. Under the AEDPA, exhaustion is not waived unless "the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). That is a highly unlikely event.
>
> FN2. Despite the dissent's allusion to the district court's order of January 6, 1995, there is not the slightest hint that the order was intended to, or did, preclude the filing of a habeas corpus application by Kelly. That is underscored by the fact that he does not argue that the order had that effect.

Of course, if Kelly's real point is that a presently incompetent person should not be executed, that claim is premature. It can only be brought up if and when an order for his execution issues. In that event, California does recognize that it cannot execute an insane person. See Kelly II, 1 Cal.4th at 544, 822 P.2d at 413, 3 Cal.Rptr.2d at 705. It provides a procedure for turning the order of execution aside. See Cal.Penal Code §§ 3700-3706. Moreover, Kelly could seek relief in the federal courts. See Martinez- Villareal v. Stewart, 118 F.3d 628, 633-34 (9th Cir.1997).

CONCLUSION

Kelly desires to turn the procedure for obtaining counsel before an application for habeas corpus is filed into a source of sempiternal delay of all state and federal proceedings against him. Before the AEDPA, that

strategy had prospects for success. In fact, he has obtained a delay of all proceedings regarding his convictions for well over four years. However, although represented by counsel and a next friend, he did not file his application for habeas corpus within one year after the passage of the AEDPA. It is now too late.

Therefore, we order the issuance of a writ of mandamus which directs the lifting of the stays of execution in United States District Court, Central District of California, Cases No. CV-92-05420-TJH and No. CV-93-02951-TJH, and which further directs the dismissal of those matters forthwith.

The petition for a writ of mandamus is GRANTED.

TASHIMA, Circuit Judge, dissenting in part:

I agree with the majority that because real party in interest Kelly had not filed a habeas corpus petition by April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Chapter 153 of the AEDPA, including the newly-enacted statute of limitations for habeas petitions, 28 U.S.C. § 2254(d)(1), applies to him. See Lindh v. Murphy, --- U.S. ----, ----, ----, 117 S.Ct. 2059, 2061, 2069, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.1997) (en banc). However, I cannot agree that this case does not present the "extraordinary circumstances" entitling Kelly to the tolling of the AEDPA's statute of limitations. I therefore respectfully dissent from Part B of the majority opinion and from the judgment.

In my view, this case is squarely controlled by Calderon v. United States Dist. Court, 112 F.3d 386 (9th Cir.1997) (Beeler). In Beeler, we first held that § 2254(d)(1) was a statute of limitations and not a jurisdictional provision;

thus, that it was subject to equitable tolling. Id. at 390-91. We then described the few cases which would be eligible for equitable tolling: "Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond the prisoner's control make it impossible to file a petition on time." Id. at 391 (quoting Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir.1997)). Finally, we held that the withdrawal of an attorney, who was aiding a putative habeas petitioner to prepare his petition, whose work product was "not usable" by replacement counsel, qualified as "extraordinary circumstances" *788 which justified tolling the statute of limitations. Id. at 391-92.

Here, unfortunately, the district court's order is not as clear as it could have been. Its operative provision, without any explanation or analysis, states tersely: "It is further Ordered that the filing deadlines of the Antiterrorism and Effective Death Penalty Act of 1996 do not apply to this case." However, "[w]e may affirm on any ground supported by the record even if it differs from the rationale of the district court." Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305 (9th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996).

The record supports that Kelly has been having serious mental problems for many, many years. The State does not contend otherwise. [FN1] In recognition of this fact, the district court has set a hearing to determine Kelly's mental competency. Thus, a fair reading of the district court's order, fully supported by the record, is that it has ordered the AEDPA's statute of limitations to be tolled pending a determination of Kelly's mental competency. What the district court will then decide to do, will obviously depend on the outcome of that hearing.

> FN1. A 1995 examining psychiatrist's report concludes, in part:
> [B]eginning in January 1990 he [Kelly] has been repeatedly diagnosed as suffering from a psychotic disorder, with such symptoms as delusions, hallucination, inappropriate affect, social withdrawal, bizarreness, fragmentation of thinking, and incoherence. As recently as August 1992 several members of the psychiatric staff at San Quentin evaluated the Petitioner, and concluded that they were unable to ascertain that he was sane.
> The report further concluded:
> [H]e is now suffering form [sic.] a psychotic mental disorder of such severity that it precludes his capacity to appreciate his current legal position and make rational choices with respect to the current court proceedings.

Beeler held that the additional time required by new counsel (although there is no constitutional right to counsel in a habeas proceeding) to prepare a habeas petition was an "extraordinary circumstance" which tolled the statute. It defies logic and is contrary to the holding of Beeler to hold, as the majority does, that proceedings to determine a putative habeas petitioner's own incompetency (a petitioner who has no right to counsel) is not an "extraordinary circumstance."

The majority reaches its Draconian result-precluding Kelly from ever filing a first federal petition-by misreading the record, misapplying the law and defying our own binding precedent.

It is true, as the majority emphasizes, that these proceedings have been pending for several years. [FN2] However, it is evident from the record that most of the

delay has been caused by the district court's attempts to grapple with Kelly's mental problems. Moreover, what the majority overlooks is that, on January 9, 1995, as part of its order that Kelly be mentally evaluated and that a mental evaluation report be filed, the district court ordered "that all other aspects of this case be, and hereby are, Stayed pending a final determination by this Court of the Petitioner's mental capacity to proceed." That stay has never been lifted and Kelly's mental capacity has never been determined. [FN3] Thus, for Kelly's counsel to proceed with the filing of a petition at any time after January 9, 1995, as the majority intimates they should have, would have been in direct violation of the stay. [FN4] Few things put the doing of an act so "clearly beyond the prisoner's control," as Beeler requires, as a court order prohibiting the doing of that act.

FN2. Most of this time, of course, was before the AEDPA became effective, when there was no statute of limitations for habeas petitions.

FN3. Unable to dispute that the district court has imposed such a stay and that it is still in effect, the majority falls back on the perplexing argument that, despite its plain meaning, the district court's order does not mean what it says. Unfortunately, the parties are unable so easily to ignore the order's plain meaning and the record demonstrates that they have abided by the stay.

FN4. A habeas petition is also required to be verified personally by the petitioner, Rule 2(c), Rules Governing § 2254 Cases in the U.S. Dist. Courts ("The petition ... shall be signed under penalty of perjury by the petitioner."), a requirement which the district court has not yet determined that Kelly is able to fulfill.

Even the State has recognized that a determination of Kelly's competency is a necessary prerequisite to proceeding further:

> *789 Accordingly, given the fact that the Report [of the evaluating psychiatrist] has raised an issue as to Kelly's incompetence, and because if Kelly is incompetent, his counsel cannot proceed unless a next friend representing Kelly's interests is appointed, this Court should conduct a hearing to determine whether Kelly is in fact incompetent.

Respondent's Position Regarding Dr. Kessler's Report at 16, filed Jun. 26, 1995.

At least by January 9, 1995, when it appointed Dr. David Kessler to evaluate and determine Kelly's mental competency, the district court appreciated that Kelly posed a potential problem in terms of his competency to proceed with the preparation and filing of his federal habeas petition. Dr. Kessler's report was filed with the court within two-and-a-half months, by late March. Thereafter, for reasons not fully explained on the record, the district court did not set a competency hearing until one was requested by Kelly on March 20, 1997. The court granted Kelly's motion, but instead of setting the hearing before the April 24 expiration of the ADEPA's one-year period of limitation, it set the hearing for October 10, 1997, six months later.

In the meantime, apparently in response to the State's position regarding Dr. Kessler's report, the court appointed Kelly's mother as his next friend. However, the circumstances of the appointment make it plain that the purpose of the appointment was to assist Kelly with the competency hearing and nothing more. [FN5] This is necessarily so because a prerequisite to the appointment

of a next friend for the purpose of filing a habeas petition is a finding that the putative petitioner is incompetent to verify and file the petition himself or herself. "In Whitmore v. Arkansas, 495 U.S., at 165, 110 S.Ct., at 1725, we held that 'one necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity.'" Demosthenes v. Baal, 495 U.S. 731, 734, 110 S.Ct. 2223, 2225, 109 L.Ed.2d 762 (1990).

> FN5. The order originally did contain provisions regarding the next friend acting on Kelly's behalf with regard to internal prison matters, but those provisions were deleted by the district court after the State objected.

Because, under Whitmore, "next friend" standing is an Article III jurisdictional requirement, 495 U.S. at 162-64, 110 S.Ct. at 1726-28, where, as here, that showing has not been made, a "next friend" cannot be appointed to prosecute a habeas proceeding. Id. Thus, the record does not support the majority's conclusion that a "next friend" was qualified and available to file a habeas petition on Kelly's behalf, since no determination has yet been made that Kelly "is unable to litigate his own cause due to mental incapacity."

Finally, the majority's reliance on the California Supreme Court's analysis of why incompetency does not prevent a direct appeal from going forward is puzzling. See People v. Kelly, 1 Cal.4th 495, 546, 3 Cal.Rptr.2d 677, 706, 822 P.2d 385, cert. denied, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992) ("The considerations that prohibit an incompetent person from being tried ... do not apply after the judgment. The issues on appeal are limited to the appellate record. An appeal involves only legal issues

based on that record. Attorneys do not need to rely on the defendant himself to decide what issues are worthy of pursuit.").

Whatever the validity of that reasoning on direct appeal, it has no place in a habeas proceeding. We have said, time and again, that because issues on direct appeal are confined to the record, many potential issues, including, for example, ineffective assistance of counsel claims, cannot be raised on direct appeal, but must be raised by collateral review. E.g., United States v. Houtchens, 926 F.2d 824, 828 (9th Cir.1991). The reason for this insistence is because "habeas proceedings permit the defendant to develop a record of 'what counsel did, why it was done, and what if any, prejudice resulted.'" United States v. Daly, 974 F.2d 1215, 1218 (9th Cir.1992) (citations omitted).

Here, in fact, Kelly did make a claim of ineffective assistance on direct appeal. See Kelly, 1 Cal.4th at 519-23, 3 Cal.Rptr.2d at ***790** 688-90, 822 P.2d 385. Thus, to suggest, by analogy to direct appeal, that a putative habeas petitioner's personal participation is unnecessary to the preparation and prosecution of a habeas petition is simply mistaken. It renders superfluous and meaningless the requirement in the rules, see footnote 4, supra, that the petitioner personally verify the petition.

In sum, the circumstances here which temporarily rendered Kelly unable to file a habeas petition are at least as extraordinary as in Beeler. Kelly may be incompetent to proceed without the assistance of a "next friend." However, whether or not he is, thus qualifying him for such assistance, has not yet been determined by the district court. It is inequitable and unjust to impute to Kelly, as the majority does, the district court's delay in acting on this issue, especially when the court has stayed

all proceedings, except the competency determination. That stay has been in existence during the entire period since the AEDPA has become effective.

As indicated above, the district court has already set a hearing to determine Kelly's competency for October 10. I would hold that § 2254(d)(1)'s one- year period of limitations is tolled, due to extraordinary circumstances, until a reasonable period after the district court makes a prompt determination of whether or not Kelly is competent. If he is competent, he should be given a short, but reasonable period to file his petition. If he is incompetent, a "next friend" to file the petition on his behalf, based on his incompetency, should be appointed and that "next friend," likewise, should be given a short, but reasonable period within which to file a petition on Kelly's behalf.

That Kelly's possible incompetency requires the statute of limitations temporarily to be tolled, is not an undue interference with the State's interest. After all, that interest must be balanced, at least minimally, against a state prisoner's constitutional right to petition for the Great Writ. In these circumstances, I submit that the State's interest in insisting that the proceeding go forward immediately is not entitled to great weight. The State has no interest in executing an insane person. Ford v. Wainwright, 477 U.S. 399, 410, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."). [FN6] Thus, tolling the statute of limitations while Kelly's competency is being determined interferes only minimally with the interest of the State. Consequently, the State's interest in executing the sentence of death is an insufficient reason, contrary to the majority's intimation, not to toll the statute of limitations for a reasonable period of time.

> FN6. Even before Ford v. Wainwright, California had enacted procedures to insure that it does not execute insane persons. See 477 U.S. at 408 n. 2, 106 S.Ct. at 2601 n. 2; see also Cal.Penal Code §§ 3701 (providing procedure to inquire into capital prisoner's sanity), 3703
> (providing for confinement of insane capital prisoner in medical facility until sanity is restored).

The majority errs in focusing its wrath on Kelly's "desires," rather than its analysis on the proper scope to be accorded to the district court's order in light of the record: "Kelly desires to turn the procedure for obtaining counsel before an application for habeas corpus is filed into a source of sempiternal delay of all state and federal proceedings against him." As I have emphasized throughout this dissent, an appropriate tolling period would be far from "sempiternal," but only temporary, until Kelly's competency to proceed has been determined. Thus, the majority posits a false choice: Either Kelly cannot ever be required to file a habeas petition because the statute of limitations will be tolled forever, or the statute cannot be tolled at all and he must be prevented from filing a first federal petition and subjected immediately to an order of execution.

Because I would deny the writ, I respectfully dissent.

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APPENDIX 3

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HORACE EDWARDS KELLY, Petitioner

v.

DANIEL VASQUEZ, etc., Respondent

Case Nos. CV 93-2951 TJH and CV 92-5420 TJH

Order - Filed February 2, 1998

The Court has received the January 14, 1998, order of the Ninth Circuit Court of Appeals denying the Petitioner's petition for rehearing, rejecting the suggestion for a rehearing en banc, and reinstating the writ of mandate which ordered this Court to lift the stays of execution and to dismiss these cases.

It is further Ordered that, pursuant to the Ninth Circuit's mandate, the stays of execution be, and hereby are, Lifted.

It is further Ordered that, pursuant to the Ninth Circuit's mandate, these cases be, and hereby are, Dismissed.

Date: February 2, 1998

/s/
Terry J. Hatter, Jr.
United States District Judge

APPENDIX 4

APPENDIX 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HORACE EDWARDS KELLY, Petitioner

v.

ARTHUR CALDERON, etc., Respondent

Case Nos. CV 98-2722 TJH and CV 98-2723 TJH

Order - Filed June 3, 1998

The Court has considered Petitioner's motion for equitable tolling, *ex parte* application to shorten time for the motion for leave to file an amended petition, motion for leave to file an amended petition, and motion to stay execution, together with the moving and opposing papers.

It is Ordered that the motion for equitable tolling be, and hereby is, Granted based on prior counsels' reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity.

It is further Ordered that the *ex parte* application to shorten time for the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion to stay Petitioner's execution be, and hereby is, Granted.

It is further Ordered that Petitioner's execution be, and hereby is, Stayed pending a final resolution of his petitions.

Date: June 3, 1998

/s/
Terry J. Hatter, Jr.
Chief United States District Judge

APPENDIX 5

APPENDIX 3

For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden of California State Prison at San Quentin, Petitioner

v.

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent

v.

HORACE EDWARDS KELLY, Real Party In Interest

No. 98-70569

D.C. No. CV-98-02722-TJH
No. CV-98-02723-TJH

Opinion

Petition for a Writ of Mandamus to the United States District Court for the Central District of California

Submitted June 9, 1998
Pasadena, California

Filed: June 9, 1998

Before: Cynthia Holcomb Hall, Ferdinand F. Fernandez, and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Fernandez

FERNANDEZ, Circuit Judge:

The State of California, through the Warden of the California State Prison at San Quentin, moved to dismiss the proceedings in the United States District Court, which were filed on behalf of Horace Edwards Kelly. The State claimed that the Anti-Terrorism and Effective Death Penalty Act's one year statute of limitations for filing applications for a writ of habeas corpus precluded the continuance of the proceedings. See 28 U.S.C. § 2244(d)(1). The district court disagreed. We agree with the State, in part, and order the writ to issue.

BACKGROUND

In Calderon v. United States District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III)[1] we outlined Kelly's murderous background. Thus, we need not repeat that here.

After we ordered the prior proceedings dismissed because they were barred by the AEDPA's statute of limitations, Kelly[2] commenced two new proceedings in the district court, and filed habeas corpus petitions in those proceedings. The State filed motions to dismiss those proceedings because they were in direct contravention of our determination that the statute of limitations barred Kelly from going forward with federal habeas corpus. See id. at 785-87. The district court

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1. We call our prior decision Kelly III because in that case we refer to earlier decisions as Kelly I and Kelly II.

2. More accurately, Kelly's new next friend, the Federal Public Defender, did so on his behalf. We are not asked to determine whether the Federal Public Defender properly insinuated herself into this proceeding. Thus, we do not do so.

denied the motions and declared that the statute of limitations was tolled. This writ petition was filed before the district court made its position explicit, but it has since removed all doubt.

DISCUSSION

The State raises two separate issues. The first is that the district court improperly allowed Kelly's case to rise from the ashes into which it was converted when it became barred by the statute of limitations. The second is that the district court appeared to be allowing Kelly to develop claims which had never been exhausted in the California Supreme Court.

The latter issue appears to have been mostly mooted when the California Supreme Court ruled on the claims in questions on June 2, 1998.[3] However we agree with the State that to the extent that Kelly is being allowed to present claims based on tolling of the statute of limitations, the district court cannot go forward. Each and every tolling issue is barred by our decision in Kelly III.

Kelly did not bring his action within the time specified in the AEDPA, and in Kelly III we held that he was barred by the statute of limitations, which was not tolled under the facts of his case. That is res judicata on the issue. See Brown v. Felsen, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979); Americana Fabrics, Inc. v. L. & L. Textiles, Inc., 754 F.2d 1524, 1529

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3. The court ruled on issues arising out of Kelly's conviction and sentence in San Bernardino County, California and the issues arising out of the trial regarding his competence to be executed, which occurred in Marin County, California. Still pending before the California Supreme Court are issues arising out of his conviction and sentence in Riverside County, California. We, however, decline to issue a writ regarding the exhaustion of those issues.

(9th Cir. 1985). Kelly could have presented any and all of his claims for tolling in Kelly III and he cannot escape the bar of the statue of limitations by asserting that he now has new reasons for wanting tolling to apply. See Brown, 442 U.S. at 131, 99 S. Ct. at 2209; American Fabrics, 754 F.2d at 1529. The very assertions Kelly now makes to us were clearly present when we decided Kelly III. The possibility of Kelly's reliance on prior district court orders was mentioned in Judge Tashima's dissent. See Kelly III, 127 F.3d at 788 (Tashima, J. dissenting). It was also raised in Kelly's petition for rehearing in that case. And the State's position in Kelly III was, of course, equally well known to us at the time (and was alluded to by Kelly), as was any alleged uncertainty in the law. Finally, the rather circular argument that counsel must have been incompetent and that Kelly is entitled to tolling because he was incompetent to note the possible incompetence of his counsel has no real merit. In the first place, he was not entitled to competent counsel in his post-conviction proceedings. See Bonin v. Vasquez, 999 F.2d 425, 428-29 (9th Cir. 1993); Harris v. Vasquez, 949 F.2d 1497, 1513-14 & n.13 (9th Cir. 1991). In the second place, Kelly's claim of incompetence was clearly before us at the time, as was the state of the law, and we were fully able to assess those matters when we decided Kelly III. In short, Kelly's aduncous claim in this respect fares no better than his others. The statute of limitations issue has been finally decided against him.

Nor would it help him to suggest that res judicata does not apply to habeas corpus proceedings. His prior cases did not involve true habeas corpus petition proceedings. He never got that far. The statute of limitations bar dropped before he could. So it is now. He could not, and cannot, evade Kelly III by filing a habeas petition and relying on tolling in the face of our statute of limitations holding in that case. Moreover, even if we were to treat the statute of limitations matter in Kelly III

as if it were part of a habeas corpus proceeding for our purposes, a different principle would apply to him. The present statute of limitations matters would be successive uses of habeas corpus and would, themselves, be barred. See Ceja v. Stewart, 134 F.3d 1368, 1369 (9th Cir. 1998); see also Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996). Of course, we should not and do not apply successive petition law because Kelly's problem arose before he crossed the border into habeas corpus territory.

In fine, unless there are some claims within 28 U.S.C. § 2244(d)(1)(B) or (D), as Kelly claims there are, any attempt to bring issues involving Kelly's convictions and sentences to federal court is doomed because Kelly III was not evanescent. It bars Kelly from pursuing petitions which must rely on tolling of the statue of limitations for their validity. In other words, the district court's decision to grant tolling is erroneous as a matter of law, disregards its obligation to follow our prior mandate, will impose improper expenses and delay upon the State, and will be prejudicial in a way that cannot be corrected on appeal because it threatens an untoward interference in orderly state processes. See Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

CONCLUSION

The district court simply misunderstood the purport of our earlier mandate, and that has led it to allow Kelly to again start up his endless delaying tactics. That is not acceptable. See Ramon-Sepulveda v. INS, 824 F.2d 749, 751 (9th Cir. 1987); Brown v. Baden, 815 F.2d 575, 576 (9th Cir. 1987). His claims which would require tolling are barred by the statute of limitations.

Therefore, we order the issuance of a writ of mandamus which directs the United States District Court, Central District of California, to dismiss the purported habeas corpus petitions in cases No. CV 98-2722-TJH and

CV 98-2723-TJH forthwith to the extent that they rely on tolling for their validity.[4] In all other respects the petition is denied.

The petition for writ of mandamus is GRANTED, in part, and DENIED in part. Issuance of the writ is stayed until 5:00 p.m. on June 16, 1998. If neither a petition for rehearing (with or without an en banc suggestion) is filed nor a sua sponte call for an en banc vote is made within that period, the writ shall thereupon issue. If a petition for rehearing (with or without an en banc suggestion) or a sua sponte call is made within that period, the stay shall continue in effect until the conclusion of the process.

The parties shall bear their own costs.

COUNSEL

Harry W. Simon, Deputy Federal Public Defender, Los Angeles, California, for the petitioner.

Keith I. Motley, Supervising Deputy Attorney General, San Diego, California, for the respondent.

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4. This does not preclude proceeding on any proper claims, if any exist. Of course, that includes any proper claim of incompetence to be executed. See Kelly III, 127 F.3d at 787.

Filed June 9, 1998

Calderon v. United States District Court, No. 98-70569

TASHIMA, Circuit Judge, dissenting:

Because the underlying case is an inappropriate candidate for a writ of mandamus and because, in any event, the majority is wrong on the merits, I dissent.

As the majority recognizes, Kelly is entitled to a stay of execution so that the district court may consider his claims under Ford v. Wainwright, 477 U.S. 399 (1986), that he is not competent to be executed and that he was not afforded due process of law in his state court sanity hearing. Given those claims, a stay of execution in this case is inevitable, at least until the district court resolves the Ford claims and the aggrieved party has taken an appeal.[1] Accordingly, even if the district court's ruling that equitable tolling applies in this case is erroneous, the State of California (State) has not been prejudiced in a way that requires mandamus to correct.

The majority, however, reaches out to prejudge a host of issues that do not require decision at this time and makes that judgment on the basis of an incomplete record

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1. In our prior opinion, we noted that "if Kelly's real point is that a presently incompetent person should not be executed, that claim is premature. It can only be brought up if and when an order for his execution issues. In that event, California does recognize that it cannot execute an insane person. It provides a procedure for turning the order of execution aside. Moreover, Kelly could seek relief in the federal courts." Calderon v. United States Dist. Court, 127 F.3d 782, 787 (9th Cir. 1997) (emphasis added and citations omitted) (Kelly III). The Supreme Court has since confirmed that, irrespective of the status of his other claims, Kelly can file a first petition raising his Ford claims. Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998). Therefore a stay of execution is mandatory to enable the district court to consider the merits of these claims. Lonchar v. Thomas, 517 U.S. 314, 319-20 (1996).

and without adequate briefing. We do not issue writs of mandamus merely to correct errors that can be reached on appeal. Rather, we require that the party seeking the writ have no other adequate means to attain the relief it desires, and that the petitioner be damaged in a way not correctable on appeal. Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977). Neither of those factors exists here because our partial writ of mandamus is simply powerless to give the State the relief it desires, namely, a lifting of the stay of execution. See Lonchar v. Thomas, 517 U.S. 314, 319-20 (1996).

But even if mandamus were appropriate in this case, the majority is mistaken on the merits. The majority concludes that our decision in Kelly III, that Kelly's habeas claims are barred by the AEDPA's one-year statute of limitation, "is res judicata on the issue." While giving lip service to the rule that res judicata does not apply to habeas proceedings, the majority rejects this clear rule because of its peculiar interpretation that "[h]is prior cases did not involve true habeas corpus proceedings."

There is no requirement however, that the prior case be a habeas proceeding. The only circuits to rule on the issue have so held. See Boyer v. White, 763 F.2d 1012 (8th Cir. 1985); Heirens v. Mizell, 729 F.2d 449, 456 (7th Cir. 1984). Boyer involved a habeas petition challenging a state conviction and Heirens involved a habeas petition challenging a state denial of parole. In both cases, the state argues that the prisoners' federal habeas petitions were barred by res judicata because the same claims had been raised in prior (Boyer) or contemporaneous (Heirens) federal civil rights action under 42 U.S.C. § 1983. Both the Seventh and Eighth Circuits rejected this argument, reasoning that "a decision in another case is not res judicata as to a habeas proceeding." Heirens, 729 F.2d at 456 (quoting Warren v. McCall, 709 F.2d 1183, 1184 n.4 (7th Cir. 1983)); Boyer, 763 F.2d at 1012 (citing Heirens). Thus, the majority's contrary holding, without any

articulated justification, creates an inter-circuit conflict on this issue.

In McCleskey v. Zant, 499 U.S. 467 (1991), the Court held that a prior rejection of a habeas petition is not res judicata to a subsequent petition. Id. at 480. A fortiori, a prior non-habeas proceeding cannot be res judicata to a later habeas proceeding -- otherwise, what is the point of habeas corpus? The entire goal of a habeas petition is to challenge a prior court's resolution of constitutional claims that were raised before that court. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). In fact, that is the very essence of the exhaustion requirement. If non-habeas proceedings can be res judicata to a subsequent habeas petition, then every habeas petition must fail. Of course, if the majority means to suggest that direct appeals within the state system are not res judicata to subsequent habeas petitions in the federal system, see Brown v. Allen, 344 U.S. 443, 458 (1953), yet federal civil rulings (e.g., Kelly III) do have a res judicata effect on federal habeas petitions, it has cited no legal authority to support that unique proposition and I know of none. Yet, the majority has not even seen fit to request briefing on this novel question of law that it has raised sua sponte. One must ask, why this rush to judgment?

Moreover, it is clear that Kelly III was a habeas proceeding, and thus falls squarely within McCleskey's rejection of res judicata. In Kelly III, we invoked the AEDPA's one-year statute of limitations on habeas petitions to rule that Kelly was no longer entitled to file a habeas petition challenging his convictions and death sentences. 127 F.3d at 785. A statute of limitations, of course, is a defense. And the one-year period the AEDPA is a defense to a petition for habeas corpus. 28 U.S.C. § 2244(d)(1). See also Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997) (holding that the AEDPA's one-year limitation period is a traditional statute of limitations), cert. denied, 118 S. Ct.

899 (1998). Therefore, when we invoked the AEDPA's one-year limitations period, we were necessarily denying a writ of habeas corpus, which is exactly the ruling that does not have res judicata effect on a later petition. McCleskey, 499 U.S. at 480.

The majority has confused the procedural posture of our prior case (anticipatory denial of a petition for habeas corpus, instead of denial in the normal course of appellate review) for the substance of our decision. To deny Kelly's habeas petition before he files it is, in the end, to deny Kelly's petition. That is a habeas ruling, and it should not have res judicata effect, even under the majority's unique interpretation of the law. In short, only a perverse reading of the record supports the majority's conclusion that Kelly III was not a habeas corpus proceeding.

The proper analysis of this case, which is the first federal petition Kelly has ever filed, is whether Kelly has "abused the writ." McCleskey, 499 U.S. at 489. And this is a question, in the context of this case, that cannot be answered without a full record and a question that, in any event, should be answered by the district court in the first instance.

At the least, Kelly's present equitable tolling argument is different from the one we rejected in Kelly III. There, we considered only whether Kelly could indefinitely toll the AEDPA's one-year statute of limitations due to his alleged mental incompetency. 127 F.3d at 786-87. The majority did not consider whether tolling would be appropriate for a definite time period because of uncertainty in the law when the AEDPA was enacted, or because Kelly's mental incompetence required some limited, specific amount of extra time in which to file a petition.[2]

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2. The majority also rejects out of hand, and without analysis, Kelly's ineffective assistance of counsel claim. It does not consider

The majority now attempts to broaden Kelly III by saying that some of these issues are foreclosed because they were raised in the Kelly III dissent -- but these claims were clearly not addressed in the majority's opinion. If res judicata applied to this case, then perhaps we would defer not only to the issues actually decided in Kelly III, but also to those that could have been raised or might have been decided by implication. But the question here is, at most, abuse of the writ. I do not see how filing a first petition can ever amount to an abuse of the Great Writ, particularly one that raises legal claims on which there is no controlling authority in this circuit. Instead, I agree with the Eighth Circuit that a first habeas petition cannot be an abuse of the writ, even if it raises claims identical to those in a prior federal case. See Boyer, 763 F.2d at 1012.

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the effect of 21 U.S.C. § 848(q)(4)(B), which entitles a death-row petitioner "[i]n any postconviction proceeding under section 2254 or 2255 of title 28 . . . to the appointment of one or more attorneys." In McFarland v. Scott, 512 U.S. 849 (1994), the Court held that a "postconviction proceeding under section 2254" begins when the petitioner files a motion requesting appointment of counsel, even if no habeas petition has been filed. Id. at 856-57. We did not mention McFarland when we decided in Kelly III that a habeas proceeding does not exist until the habeas petition has been filed, regardless of how many other motions may have been filed. 127 F.3d at 785. That problem aside, McFarland squarely holds that Kelly had a statutory right to counsel beginning at the moment counsel was requested. The Eighth Circuit reasoned that this statutory right to counsel means a lawyer that will "communicate with his or her client." Murray v. Delo, 34 F.3d 1367, 1373 (8th Cir. 1994). Thus, Kelly's alleged mental incompetency may be yet another reason to toll the AEDPA's one-year limitations period, as Kelly's inability to communicate with his own lawyers was surely "a turn of events over which [Kelly] had no control." Beeler, 128 F.3d at 1289. This issue has never been ruled on by any judge and should not be foreclosed by the offhand treatment given to it by the majority.

Kelly III's rush to judgment was a mistake, and the majority today compounds its error. A writ of mandamus is an extraordinary remedy, not only because it requires expedited resolution of difficult questions of law, but also because it shortcuts normal deliberative procedures. As Kelly's current motion for equitable tolling demonstrates, there are a host of arguments that we never addressed in Kelly III, but that could have been raised in the normal process of review, had the record been fully developed, had the lawyers been given more time, and had the district court passed on these issues in the first instance after development of a full evidentiary record.

Unfortunately, rather than realizing its past error and permitting its correction, the majority in a defensive reaction now relies on the dissent in Kelly III to pretend that it "implicitly" must have decided all these questions it refused to address. And it compounds this mistake by ignoring the standards for granting a writ of mandamus[3/] and by formulating and unsound extension of the doctrine of res judicata.

Because the district court should be permitted expeditiously to get on with its task of deciding this difficult case without further interference, I would deny the State's petition for a writ of mandamus. I therefore respectfully dissent.

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3. The majority states in conclusory fashion that the district court's consideration of Kelly's claims in his first petition, except for his "incompetence to be executed" claims, "will be prejudicial in a way that cannot be corrected on appeal because it threatens an untoward interference in orderly state processes." Of course, this contention can be made every time a federal court entertains a first habeas petition of a state prisoner under sentence of death.

APPENDIX 6

APPENDIX 6

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden of
California State Prison at San
Quentin, Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA, Respondent,

v.

HORACE EDWARDS KELLY, Real Party in Interest.

Opinion

No. 98-70569

D.C. Nos. CV-98-02722-TJH, CV-98-02723-TJH

Petition for a Writ of Mandamus to the
United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted
July 23, 1998--San Francisco, California

Filed December 8, 1998

Before: Procter Hug, Jr., Chief Judge, and James R. Browning, Betty B. Fletcher, Harry Pregerson, Stephen Reinhardt, Cynthia Holcomb Hall, Alex Kozinski, David R. Thompson, Stephen S. Trott, A. Wallace Tashima, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Tashima; Concurrence by Judge Thompson; Concurrence by Judge Silverman; Dissent by Judge Hall

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SUMMARY

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Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. Sitting en banc, the court held that res judicata does not apply to a federal habeas corpus petition.

Real party in interest Horace Kelly was convicted of capital murder in California state court and sentenced to death. In Kelly III, the court of appeals ordered Kelly's federal proceedings dismissed on the ground that they were barred by the statute of limitations prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") for habeas corpus petitions. In so holding, the

court determined that Kelly could not indefinitely toll the statute on the basis of his alleged mental incompetency.

Kelly filed two more federal proceedings in which he sought habeas corpus relief. Kelly's claims included the assertions that he is not competent to be executed, and that he did not receive due process in his state sanity hearing.

California moved to dismiss on the ground that the proceedings contravened the determination of the court of appeals in Kelly III that the statute of limitations barred Kelly from seeking relief by way of federal habeas corpus.

The district court denied the State's motion on the ground that the statute of limitations had been tolled. The State petitioned for a writ of mandamus.

In Kelly IV, a three-judge panel of the court of appeals granted in part the State's second mandamus petition. The court granted en banc review.

[1] Bauman v. United States District Court, 557 F.2d 650 (1977) delineated the five factors that support the issuance of

a writ of mandamus: (1) the party seeking the writ has no other adequate means to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; (5) the district court's order raises new and important problems, or issues of law of first impression.

[2] To satisfy either of the first two factors, a litigant must demonstrate some burden imposed by a clearly erroneous district court order other than mere cost and delay. [3] There is no reason why a first habeas petition in a death penalty case should be a unique exception to the general unwillingness of the court of appeals to grant mandamus merely to avoid the normal cost and delay associated with litigation.

[4] Given the near-prohibition against the filing of successive petitions mandated by the AEDPA, and the irreversible consequences that flow from the rejection of a capital habeas petitioner's first petition, the State's interests in factors one and two are assigned less importance when the court of appeals deals with a first petition from a sentence of death. [5] The first two Bauman factors weighed against the State. Kelly never had a federal court rule on his constitutional claims. It would have been inappropriate to prevent that consideration merely to accommodate the State's desire for a quick execution.

[6] Mandamus would have been particularly inappropriate in this case because a stay of execution was inevitable. Kelly's claim of present incompetence to be executed became ripe and exhausted only in 1998. Kelly's presentation of the claim to the district court was a first petition; under the AEDPA, this claim was not time-barred, and Kelly was therefore entitled to a stay. The prejudice the State sought to avoid could not be avoided.

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[7] The fifth factor was not present because the Ninth Circuit had already confirmed the availability of equitable tolling of the AEDPA's time bar. The district court's

invocation of tolling did not support the existence of the fifth Bauman factor.

[8] Despite disagreement between the district court and the three-judge panel about how broadly to read Kelly III, the fourth factor was not present either. A disagreement about the scope of a prior appellate ruling is not an uncommon occurrence, and does not normally merit correction by mandamus.

[9] Similarities between Kelly III and Kelly IV suggested the applicability of legal doctrines designed to prevent endless litigation of the same claims--law of the case, res judicata, and abuse of the writ. If one of these doctrines were applicable, the clear error inquiry could be resolved. If not, the court of appeals had to determine the timeliness of Kelly's habeas petitions.

[10] Law of the case never prevents an en banc court from disagreeing with the prior decisions of a three-judge panel. Thus, even if Kelly III were the law of the case as to the three-judge panel in Kelly IV, it was not the law of the case as to the en banc court.

[11] The three-judge panel relied on res judicata to bar reconsideration of the effect of the AEDPA's statute of limitations. Res judicata bars reconsideration not only of those questions resolved in a prior case, but also of those that could have been raised and resolved in the prior case. [12] The panel majority's use of res judicata had to be rejected because it contravened the rule that res judicata has no application in habeas corpus. [13] Res judicata does not apply to a habeas corpus petition, regardless of the nature of the prior proceeding.

[14] The rule against applying res judicata in habeas cases

was not abrogated by the AEDPA. The AEDPA merely codi-

fied the abuse-of-the-writ doctrine. [15] Res judicata would render largely superfluous the AEDPA's specific provisions governing successive habeas petitions.

[16] Kelly's habeas petitions were not and could not have been an abuse of the writ because they were the first federal petitions he ever filed. Opposing a mandamus petition is not an adequate substitute for raising every claim that one might prudently raise in a habeas petition. It was the State that sought mandamus and selected the issues to be contested. This reversal of the litigants' positions, combined with the transfer of agenda-setting power to the State, made Kelly's opportunity to respond to the mandamus petition an inadequate substitute for a first habeas petition.

[17] The AEDPA does not apply to cases pending at the time of the statute's enactment. [18] Kelly's case was not pending when the AEDPA was enacted. The one-year statute of limitations therefore applied [19] Kelly III's holding, that a habeas "case" is not pending until the petition has been filed, had to be overruled. [20] The district court proceedings that Kelly filed in 1992 and 1993 were dismissed under the compulsion of the writ of mandamus issued in Kelly III. Thus, the district court's decision to consider Kelly's habeas petitions on the merits was not clear error.

[21] Under the circumstances, one remedy available to Kelly was to move in the district court to set aside the dismissals, and to permit or deem the habeas petitions to

be filed in the earlier cases nunc pro tunc as of the date they were filed in the 1998 cases. Good and just cause existed to set the dismissals aside. [22] In the alternative, it was not clear error for the district court to hold that Kelly's 1998 habeas petitions were not barred by the AEDPA's one-year statute of limitations. The court's finding that the statute of limitations should be equitably tolled was clearly correct.

[23] First, the district court ordered that all other aspects of this case be stayed pending final determination of Kelly's

mental capacity. This stay prevented Kelly's counsel from filing a habeas petition, and justified equitable tolling. [24] Second, Kelly's alleged mental incompetency justified equitable tolling, at least until a reasonable period elapsed after the district court made a competency determination. [25] Third, Kelly had timely habeas proceedings pending at one time. Those proceedings were mistakenly dismissed through no fault of Kelly under compulsion of the writ of mandamus issued in Kelly III. This error presented an independent ground to toll the statute of limitations.

Judge Thompson concurred specially, expressing disagreement with the majority's conclusion that Kelly's alleged mental incompetency tolled the AEDPA's one-year statute of limitations.

Joined by Judge Kozinski, Judge Silverman also concurred specially to criticize the majority's rejection of res judicata in the habeas context.

Judge Hall dissented, stating the view that the AEDPA

barred Kelly from filing a first habeas petition.

COUNSEL

Daniel E. Lungren, Attorney General of California, Keith I. Motley, Supervising Deputy Attorney General, San Diego, California, for the petitioner.

Maria E. Stratton, Federal Public Defender, David W. Fermino, Assistant Federal Public Defender, Los Angeles, California, for the real party in interest.

No appearance for the respondent.

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OPINION

TASHIMA, Circuit Judge:

This case comes to us in an unusual procedural posture, complicated by an atypical history. Real party in interest Horace Edwards Kelly (Kelly) was sentenced to death in two separate cases by the California state courts. See People v. Kelly, 51 Cal.3d 931 (1990), cert. denied, 502 U.S. 842 (1991)(Kelly I); People v. Kelly, 1 Cal.4th 495, cert. denied, 506 U.S. 881 (1992) (Kelly II). For most of the past several years, Kelly's attorneys have been

attempting to determine Kelly's competency to assist them in preparing his first federal habeas corpus petitions. In Calderon v. United States Dist. Court, 127 F.3d 782 (9th Cir. 1997), cert. denied, 118 S. Ct. 1395 (1998) (Kelly III), a three-judge panel granted the petitioner Warden's (State) first petition for a writ of mandamus and preemptively held that Kelly's first habeas petitions -- insofar as they might challenge his convictions and death sentences -- could never be filed because of the time bar of 28 U.S.C. S 2244(d)(1). Kelly, nonetheless, later did file his first petitions. When the district court equitably tolled the time bar of S 2244(d)(1) so that it could reach the merits of Kelly's claims,1 the same three-judge panel granted in part the State's second petition for writ of mandamus. Calderon v. United States Dist. Court, No. 98-70569, slip op. at 5997 (9th Cir. Jun. 9, 1998) (Kelly IV). We granted en banc review.2

The history of this case, combined with its procedural posture, require us to address several issues of concern in habeas corpus law. First, we must clarify whether a writ of mandamus can properly be issued to prevent the consideration of a first habeas petition. Second, we address the holding in Kelly IV, that res judicata applies in the habeas context. Third, we

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1 No hearing on the merits has yet been held.
2 Kelly IV has been withdrawn. Calderon v. United States Dist. Court, No. 98-70569, 1998 WL 351217 (9th Cir. Jun. 26, 1998).

discuss what kinds of legal proceedings qualify as a "case" for purposes of the Supreme Court's holding that the Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"), Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214, does not apply to "cases pending" at the time of the statute's enactment. See Lindh v. Murphy, 117 S. Ct. 2059, 2061 (1997). Finally, we address whether Kelly's habeas proceedings, or petitions, were timely commenced.

I. History of the Case

The opinions in Kelly I, Kelly II, Kelly III and Kelly IV fully explain the history of this case, and we summarize it here only briefly. Kelly was convicted and sentenced to death in Riverside County, California, for the murder of Danny O. Kelly I, 51 Cal. 3d at 940. He was also convicted and sentenced to death in San Bernardino County, California, for the murders of Sonia Reed and Ursula Houser. Kelly II, 1 Cal.4th at 511. Each of these death sentences has been treated independently by the State, which is why we refer throughout this opinion to Kelly's first habeas petitions, in the plural.

Following the state court affirmances of his convictions and death sentences, Kelly turned to federal court. In 1992 and 1993, acting on an application for the appointment of counsel to initiate habeas proceedings and for a stay of execution filed by Kelly, the district court stayed Kelly's scheduled executions and appointed counsel to represent him.3 No habeas petitions were filed at that time. On April 24, 1996, Congress enacted the AEDPA, which imposes a one-year statute of limitations on the filing of a habeas corpus petition that challenges a state conviction. 28 U.S.C. S 2244(d)(1). The Supreme Court has held, however, that the AEDPA does not apply to cases that were pending on the AEDPA's effective

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3 This was in accordance with customary practice and Local Rules 26.8.7(b) and (c) of the Central District of

California. See Brown v. Vasquez, 952 F.2d 1164, 1165 (9th Cir. 1991).

date, i.e., any case pending on April 24, 1996. See Lindh, 117 S. Ct. at 2061; see also Jeffries v. Wood, 114 F.3d 1484, 1494 (9th Cir.) (en banc), cert. denied, 118 S. Ct. 586 (1997).

From 1992 to 1997, Kelly's proceedings remained in the district court. During this period, Kelly did not file a petition for habeas corpus. On September 18, 1997, a three-judge panel of this court granted the State's first petition for a writ of mandamus and ordered the dismissal of Kelly's proceedings. See Kelly III, 127 F.3d at 787. The panel majority reasoned that there was no point to the proceedings because any habeas petition that Kelly might eventually file would be time-barred under the AEDPA. The panel majority first noted that under Lindh, the AEDPA does not apply to cases pending on April 24, 1996, but, applying existing circuit precedent, the panel majority concluded that a habeas case is "pending" only when an actual petition for habeas corpus has been filed -- and Kelly had not yet filed his petitions. He had merely requested the appointment of counsel to prepare and file his petitions. Second, the panel majority rejected Kelly's argument in favor of equitable tolling of S 2244(d)(1)'s one-year statute of limitations. Third, the panel majority acknowledged that the one-year limitations period would not bar Kelly's claim under Ford v. Wainwright, 477 U.S. 399 (1986), that he is currently incompetent to be executed, but it found that claim to be premature for federal review. Kelly III, 127 F.3d at 787. Thus, the writ of mandamus was granted. The district court, as it was ordered to do, then vacated the stay and dismissed the proceedings.

The state courts then set new execution dates for Kelly and the State petitioned the state trial court to determine Kelly's present competence to be executed. A divided jury found that Kelly was sane. Kelly then filed two federal habeas petitions which are the subject of this mandamus petition. These petitions raised the Ford claim and also raised numerous challenges to Kelly's Riverside and San Bernardino convictions and death sentences. The district court held that the one-year

limitations period of the AEDPA was tolled; consequently, that none of Kelly's claims was time-barred. This order prompted the State to file a second petition for a writ of mandamus. The same three-judge panel that heard Kelly III again granted the writ. See Kelly IV, slip op. at 5994. In the panel majority's view, Kelly III had resolved the question of the applicability of the AEDPA's statute of limitations and was res judicata to any later reconsideration of that issue. Id. at 5995. Accordingly, Kelly IV ordered the dismissal of all claims, except Kelly's Ford claim, and ordered the stay of execution to be vacated to the extent that it was based on Kelly's non-Ford claims. Id. at 5997 & n.4.

We then granted en banc review of Kelly IV.

II. The Writ of Mandamus

The role of the court of appeals in this case is strongly constrained by the fact that we are considering a petition for a writ of mandamus and not reviewing a final judgment. Normally, in an appeal, we receive a case after the district court has resolved every claim presented, after the parties have had the opportunity to raise every

argument they choose, and after the facts have been fully developed. A petition for mandamus, however, is an original proceeding and, thus, is different from the normal appellate process in all of those respects. These differences become especially significant in death penalty cases. We do not know whether Kelly's habeas petitions have merit; we lack the benefit of the historical hindsight that we usually possess when we review a case after the facts have been developed; and the briefing before us has necessarily been limited to those issues raised by the State in its petition for mandamus.

[1] Because of the difficult position in which a mandamus petition places the court of appeals, we have repeatedly characterized mandamus as an "extraordinary" or "drastic" remedy. E.g., Calderon v. United States Dist. Court (Gordon),

107 F.3d 756, 761 (9th Cir.), cert. denied, 118 S. Ct. 265 (1997); Armster v. United States Dist. Court, 792 F.2d 1423, 1431 (9th Cir. 1986). The Supreme Court has admonished that mandamus must not become a substitute for the normal appellate process. Kerr v. United States District Court, 426 U.S. 394, 402 (1976); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). To provide guidance for when mandamus may be permissible, we have adopted a five-part test. In Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977), we delineated the five factors that support the issuance of a writ of mandamus:

> (1)The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.

> (2) The petitioner will be damaged or prejudiced in a way that is not correctable on appeal . . . .
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. at 654-55 (citations omitted).

We have repeatedly employed the five Bauman factors in mandamus cases, e.g., Taiwan v. United States Dist. Court, 128 F.3d 712, 717 (9th Cir. 1997); McDaniel v. United States Dist. Court, 127 F.3d 886, 888 (9th Cir. 1997), although we have never foreclosed the possibility that other factors might be relevant in an exceptional case. See Calderon v. United States Dist. Court (Hayes), 103 F.3d 72, 74 (9th Cir. 1996),

cert. denied, 117 S. Ct. 2532 (1997). In general, we are guided by the Bauman factors, and they should be weighed together, as is appropriate, based on the facts of the individual case. Star Editorial, Inc. v. United States Dist. Court, 7 F.3d 856, 859 (9th Cir. 1993). Except for supervisory mandamus cases, the absence of factor three -- clear error as a matter of law -- will always defeat a petition for mandamus. Calderon v. United States Dist. Court (Taylor), 134 F.3d 981, 984 (9th Cir.), cert. denied, 67 U.S.L.W. 3204 (U.S. Oct. 5, 1998) (No. 97-1841); Taiwan, 128 F.3d at 717; Executive Software No. Am., Inc.

v. United States Dist. Court, 24 F.3d 1545, 1551 (9th Cir. 1994). The other factors may be more or less relevant, depending on the precise claims at issue, but we have noted that factors one and two usually travel together, Bauman, 557 F.2d at 654, while factors four and five seldom do. Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1491 (9th Cir. 1989).

Here, we face a petition for mandamus that asks us to order the dismissal of Kelly's first habeas petitions, including almost all the constitutional claims therein, before the districtcourt can consider any of those claims on the merits. As explained below, we find that all five factors counsel against the issuance of mandamus; accordingly, we deny the petition.

A. Factors One and Two: Other adequate means for relief and non-correctable prejudice.

Because these factors are similar, we consider them together. When we say that a litigant has no adequate means for relief other than mandamus, or that he or she will be prejudiced in a way not correctable on appeal, we do not mean that the litigant has been forced by an erroneous ruling of the district court to suffer unnecessary cost and delay. Mortgages, Inc. v. United States Dist. Court, 934 F.2d 209, 211 (9th Cir. 1991); In re Sugar Antitrust Litig., 559 F.2d 481, 484 & n.1 (9th Cir. 1977). That happens every single time a litigant loses a summary judgment motion that he or she should have won,

every time a district court mistakenly thinks federal jurisdiction exists when it does not, and every time a meritorious motion for judgment as a matter of law is

denied. Undoubtedly, the cost and delay occasioned by such erroneous rulings, in the aggregate, are quite significant and can be quite burdensome to the individual litigant. If such harm could support mandamus, however, then mandamus would no longer be an extraordinary remedy and we will have effectively abandoned our tradition against piecemeal appeals.

[2] Thus, in order to satisfy either of the first two factors, a litigant must demonstrate some burden imposed by a clearly erroneous district court order, other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system. For example, these factors could be satisfied if the litigant's claim will obviously be moot by the time an appeal is possible, e.g., Medhekar v. United States Dist. Court, 99 F.3d 325, 326-27 (9th Cir. 1996), or when the person affected by the district court's order will not have the ability to appeal. E.g., Oregonian Publ'g Co. v. United States Dist. Court, 920 F.2d 1462, 1465 (9th Cir. 1990). But, in general, the mere annoyance and cost of having to litigate will not support mandamus. Mortgages, Inc., 934 F.2d at 211.

[3] We see no reason why a first habeas petition in a death penalty case should be a unique exception to our general unwillingness to grant mandamus merely to avoid the normal cost and delay associated with litigation. Now that Congress has enacted a statute of limitations for the filing of habeas petitions, see 28 U.S.C. S 2244(d)(1), and given our holding that this limitations period can be equitably tolled in the proper circumstances, see Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1288-89 (9th Cir. 1997), cert. denied, 118 S. Ct. 1389 (1998), there will undoubtedly be a number of cases in which the putative habeas petitioner's ability to qualify for equitable tolling will be in doubt. The inevitable prejudice

that will accrue to the State in such cases is that executions will sometimes be delayed because the dis-

trict court mistakenly tolled the one-year limitations period nd proceeded to consider the petitioner's claims on the merits, when it should not have done so. This kind of delay is going to happen often enough that, if this circumstance were sufficient to support the issuance of a writ of mandamus, the writ would no longer be an extraordinary remedy. It would become all too commonplace and almost routine in death penalty cases.4

[4] We acknowledge that the prejudice to the State stemming from a delayed execution is different in character from the prejudice to a litigant in, for example, a trademark, a product liability or an air crash case, who is erroneously forced to endure a trial when he or she should have prevailed on summary judgment. On the other hand, however, the interest of the capital habeas petitioner in having his first habeas petition heard completely and fully is also different in kind. Given the near-prohibition against the filing of successive petitions now mandated by the AEDPA, see 28 U.S.C. S 2244(b), and the irreversible consequences that flow from the rejection of a capital habeas petitioner's first petition, we are constrained to assign less importance to the State's interests in Bauman factors one and two when we deal with a first petition from a sentence of death. McDaniel, 127 F.3d at 889 ("[W]hile the State probably cannot correct on appeal any negative effects it sustains as a result of compliance with the district court's . . . order, this factor carries little weight compared with the needs of an incarcerated capital habeas petitioner .. . .").
Indeed, the Supreme Court has stressed that a capital

habeas petitioner is entitled to a full consideration of all of his or her claims in his or her first petition before a stay of execution

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4 At issue in this case is the district court's denial of the State's Rule 12(b)(6) motion to dismiss on statute of limitations grounds. There is no reason why this motion to dismiss should be treated differently, i.e., reviewed by mandamus rather than on appeal from a final judgment, than the dozens of 12(b)(6) rulings that district courts in this circuit make every day.

can be lifted. Lonchar v. Thomas, 517 U.S. 314, 319-20 (1996). Lonchar supports our reluctance to truncate the district court's consideration of a capital petitioner's first habeas petition by piecemeal review of selected issues by way of mandamus.

[5] Thus, we find that the first two Bauman factors weigh against the State. Kelly has never had a federal court rule on his constitutional claims stemming from his convictions and death sentences. It would be inappropriate for us to prevent that consideration merely to accommodate the State's desire for a quick execution.

[6] Indeed, mandamus would be particularly inappropriate in this case because a stay of execution is inevitable. Kelly's claim of present incompetence to be executed became ripe and exhausted only in 1998. Under Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998), Kelly's presentation of the Ford claim to the district court is a first petition; under the AEDPA, this claim is clearly not time-barred; and under Lonchar, Kelly is therefore entitled to a stay. Thus, the prejudice that the State seeks

to avoid cannot be avoided. A delay in Kelly's execution is inevitable. To be sure, the extent of this delay may depend on whether the district court considers only Kelly's Ford claim, or whether it considers all of Kelly's claims. At this point, however, the special need for mandamus is so vitiated, because the writ cannot really give the State the relief it desires, that factors one and two weigh strongly against mandamus.

B. Factors Four and Five:
Oft-repeated error and new questions of law.

[7] The fourth and fifth Bauman factors are the opposite sides of the same coin, Admiral Ins., 881 F.2d at 1491, but it is certainly possible that, as here, neither of them might exist in a particular case. The fifth factor -- the existence of a new and important question of law -- is not present because this

court's decision in Beeler (which was decided prior to Kelly III) had already confirmed the availability of equitable tolling of the AEDPA's time bar. Thus, the district court's invocation of tolling in this case is merely the application of Beeler to a particular set of facts. It does not support the existence of the fifth Bauman factor.

[8] The fourth factor is not present either, despite the disagreement between the district court and the three-judge panel about how broadly to read the panel's opinion in Kelly III. The district court apparently took Kelly III to foreclose only those grounds for tolling actually discussed in Kelly III, while the panel majority gave Kelly III a much broader reading. See Kelly IV, slip op. at 5997. A disagreement about the scope of a prior

appellate ruling is not an uncommon occurrence in a hierarchical judicial system, and it does not normally merit correction by mandamus. If such a disagreement happened repeatedly, we might label it an "oft-repeated error" or a "persistent disregard of the federal rules," Bauman, 557 F.2d at 655, thereby justifying mandamus. But that has not happened in these cases.

C. Factor Three: Clear error as a matter of law.5

We have reserved this Bauman factor for last because it is the most complex. A majority of the three-judge panel found clear error because, in its view, Kelly III flatly precluded reconsideration of the AEDPA's time bar and the question of equitable tolling. See Kelly IV, slip op. at 5995.

[9] While we disagree with the panel majority that Kelly III

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5 In order to decide whether "clear error as a matter of law" exists, we must first examine what the law is, before deciding whether the district court clearly departed from it. See, e.g., Beeler, 128 F.3d at 1288 ("The district court's interpretation of AEDPA's limitations period was not, however, clearly erroneous. It was, rather, clearly correct."); Portillo v. United States Dist. Court, 15 F.3d 819, 822 (9th Cir. 1994).

has this preclusive effect, we do note that Kelly IV looks a lot like Kelly III: It has the same parties; the same facts; several of the same issues; and, until we granted rehearing en banc, the same judges. These similarities between Kelly III and Kelly IV suggest the possible applicability of one

or more of an array of legal doctrines that are designed to prevent endless litigation of the same claims -- specifically, law of the case, res judicata, and abuse of the writ. Obviously, if we found one of these doctrines applicable, that could resolve our clear error inquiry. If not, we must then proceed to determine the timeliness of Kelly's habeas petitions.

1. Law of the Case

Kelly suggests that law of the case is the appropriate framework to decide whether Kelly III precludes the reconsideration of equitable tolling in Kelly IV. He argues that Kelly III lacks this preclusive effect because in Kelly IV he has raised new grounds for equitable tolling, grounds that were not raised or considered in Kelly III. Kelly then cites the familiar rule that law of the case prevents reconsideration only of those issues expressly resolved, or necessarily resolved by implication, in the prior decision. See Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 715 (9th Cir. 1990).

[10] We can dispense with law of the case as an impediment to considering the timeliness of Kelly's first petitions for one simple reason. Law of the case never prevents an en banc court from disagreeing with the prior decisions of a three-judge panel. Jeffries, 114 F.3d at 1492; Watkins v. United States Army, 875 F.2d 699, 704 n.8 (9th Cir. 1989) (en banc). Thus, even if Kelly III were law of the case as to the three-judge panel in Kelly IV, it is not law of the case as to the en banc court. Accordingly, we need not consider whether Kelly III and Kelly IV are truly the same "case" for purposes of law of the case, nor need we decide what issues Kelly III expressly resolved or resolved by necessary implication. The law of the

case established by a three-judge panel simply does not bind the en banc court.

2. Res Judicata

[11] The three-judge panel in this case relied on res judicata to bar reconsideration of the effect of the AEDPA's statute of limitations. See Kelly IV, slip op. at 5995. The panel majority noted that res judicata bars the reconsideration not only of those questions resolved in a prior case, but also of those that could have been raised and resolved in the prior case. Id. Thus, the panel majority was unmoved by Kelly's argument that he was now raising different grounds to support the application of equitable tolling from those considered in Kelly III. From the panel majority's perspective, that was irrelevant, since Kelly concededly could have raised those grounds in the prior mandamus case.

[12] We reject the panel majority's use of res judicata because it contravenes the longstanding rule that res judicata has no application in habeas corpus. The entire point of a habeas petition that challenges a state conviction is to relitigate issues that were raised in the state case and resolved against the petitioner. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).6 Obviously, then, res judicata, in the traditional sense of that doctrine, cannot apply in habeas corpus; otherwise, nearly every habeas petition would be barred by the original trial. See Brown v. Allen, 344 U.S. 443, 458 (1953) (holding that state proceedings are not res judicata to federal habeas cases).

The Supreme Court has confirmed that even a first habeas petition is not res judicata to subsequent petitions. McClesky

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6 In fact, under the "exhaustion" requirement, a habeas petitioner must "afford the State a full and fair opportunity to address and resolve the claim on the merits." Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992) (citation omitted).

v. Zant, 499 U.S. 467, 479 (1991). Rather, federal courts have created a doctrine known as "abuse of the writ " that serves as a substitute for res judicata by limiting the availability of successive habeas petitions when a prior one has been denied. Id. at 480-88. But the Court has been very clear that abuse of the writ is a substitute for res judicata, and that res judicata, strictly speaking, does not attach to the denial of a first habeas petition. Id. at 479-88.

[13] If we characterize Kelly III as a habeas proceeding, then McClesky squarely forecloses any possibility that res judicata could apply to this case. The panel majority, however, preferred to characterize Kelly III as something else (what exactly it was, the panel majority did not say), reasoning that it could not be a habeas proceeding because Kelly had never filed a habeas petition. See Kelly IV, slip op. at 599. While that characterization of Kelly III is debatable, see Kelly IV, slip op. at 6000-01 (Tashima, J., dissenting), we need not struggle to characterize Kelly III. What matters is that this case is a habeas proceeding. McClesky categorically rejected res judicata from a first federal habeas petition to a second; thus, if even those potentially identical cases cannot trigger res judicata, it

follows that nothing else can. We join the Seventh and Eighth Circuits in holding that res judicata does not apply to a petition for habeas corpus, regardless of the nature of the prior proceeding. See Boyer v. White, 763 F.2d 1012 (8th Cir. 1985); Heirens v. Mizell, 729 F.2d 449, 456 (7th Cir. 1984).

[14] We also reject the State's argument that the traditional rule against applying res judicata in habeas cases has somehow been abrogated by the AEDPA. The State seizes on a part of one sentence in Felker v. Turpin, 116 S. Ct. 2333 (1996), in which the Supreme Court described one effect of the AEDPA: "The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" Id. at 2340. Because the State omits every word after "rule" when

it quotes from Felker in its brief, it generates the illusion that Felker welcomed res judicata into habeas law. But once we read the entire sentence, we see that the Court was stating merely that the AEDPA statutorily codified the abuse of the writ doctrine, and it used the words "modified res judicata rule" as a shorthand description of that doctrine.

[15] Indeed, even after the AEDPA, it is still true that federal habeas relief exists in order to relitigate claims that were previously decided in state court, so it is quite fanciful to suggest that the AEDPA sub silentio introduced res judicata into habeas law. Further, the AEDPA includes specific provisions to govern successive habeas petitions, see 28 U.S.C. S 2244(b), and res judicata would render those provisions largely superfluous. We

conclude that even after the AEDPA, the rule is as it has always been: Res judicata does not apply to habeas cases.

3. Abuse of the Writ

Having rejected law of the case and res judicata, we turn to the last doctrine that might have prevented the district court from reconsidering Kelly III's holding that Kelly is timebarred from challenging his state convictions and death sentences in federal court: Abuse of the writ. Generally, this doctrine forbids the reconsideration of claims that were or could have been raised in a prior habeas petition. McClesky, 499 U.S. at 489. Abuse of the writ evolved as a judicially created equitable doctrine, but it is now codified by the AEDPA. Felker, 116 S. Ct. at 2340; 28 U.S.C. S 2244(b).

[16] Kelly's present habeas petitions are not, and cannot be, an abuse of the writ because they are the first federal petitions he has ever filed. Boyer, 763 F.2d at 1012. We realize that in opposing the State's petition for mandamus in Kelly III, Kelly theoretically could have raised every possible argument against holding his petitions time-barred. But we do not think that Kelly's failure to present all possible grounds for relief in

that defensive posture transforms his later habeas petitions into an abuse of the writ. The reason why successive petitions are often deemed abusive is that the first petition provided an adequate opportunity for the petitioner to raise all of his claims, and the petitioner simply chose not to take advantage of that opportunity. McClesky, 499 U.S. at 493. This case is different because opposing a petition for a writ of mandamus is not an

adequate substitute for raising every claim that one might prudently raise in a habeas petition. It was the State that sought mandamus and that set the agenda, i.e., selected the issues to be contested, before the court of appeals. We think this reversal of the litigants' positions, combined with the transfer of agenda-setting power to the State, made Kelly's opportunity to respond to the petition for a writ of mandamus an inadequate substitute for a first habeas petition. Accordingly, Kelly III does not turn Kelly's first habeas petitions in Kelly IV into an abuse of the writ.

4. Timeliness

[17] Having concluded that Kelly III does not preclude reconsideration of the application of the AEDPA's one-year statute of limitations, we now turn to that issue. The AEDPA does not apply to "cases pending" at the time of the statute's enactment. Lindh, 117 S. Ct. at 2061; Jeffries, 114 F.3d at 1494. In Beeler, we held that a habeas case was not "pending" merely because a petition for the appointment of counsel to prepare and file a habeas petition had been filed. 128 F.3d at 1287 n.3. Rather, Beeler held that a case is pending within the meaning of Lindh only when a petition for a writ of habeas corpus has been filed. Id.

Beeler acknowledged some tension between its holding and the Supreme Court's decision in McFarland v. Scott, 512 U.S. 849 (1994). McFarland held that for purposes of 21 U.S.C. S 848(q)(4)(B), which provides for the appointment of counsel for capital defendants in post-conviction proceedings, a "post conviction proceeding" is pending when a request for

the appointment of counsel has been made. Id. at 856. Beeler limited McFarland's broad conception of a proceeding to 21 U.S.C. S 848(q)(4)(B), and it held that for purposes of the AEDPA (and consequently Lindh), a case begins only with the filing of a petition for habeas corpus. 128 F.3d at 1287 n.3.

[18] It was Beeler that initiated Kelly III and Kelly IV's struggle with equitable tolling. Given Beeler, it was clear that Kelly's case was not pending when the AEDPA was enacted; therefore, the one-year statute of limitations applied to this case. Kelly III correctly noted that in light of Beeler, Kelly's hopes for federal habeas relief depended on equitable tolling, at least for his non-Ford claims. See Kelly III, 127 F.3d at 785.

Recently, however, the Supreme Court decided Hohn v. United States, 118 S. Ct. 1969 (1998), a decision that has vitiated Beeler's holding. Hohn's narrow holding was that the Supreme Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability under 28 U.S.C. S 2253(c). Id. at 1971. But the Court's reasoning was somewhat broader. The Court based its decision on 28 U.S.C. S 1254, which states that "Cases in the courts of appeals may be reviewed by the Supreme Court" by several methods, including certiorari. Asked whether an application for a certificate of appealability constituted a "case," the Court unhesitatingly answered yes:

> There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under S 1254(1). As we have noted, "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes . . ., each meaning a proceeding in court, a suit, or action." Blyew v. United States, 13 Wall. 581, 595 (1871). The dispute over Hohn's entitle-

> ment to a certificate falls within this definition. It is a proceeding seeking relief for an immediate and
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> redressable injury, i.e., wrongful detention in violation of the Constitution. There is adversity as well as the other requisite qualities of a "case" as the term is used in both Article III of the Constitution and the statute here under consideration.

Id. at 1972. Of particular relevance to Beeler's holding that a petition for the appointment of counsel and a motion for a stay of execution do not start a habeas case is the following passage from Hohn:

> We further disagree with the contention . . . that a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being in the court of appeals. Precedent forecloses this argument. In Ex Parte Quirin, 317 U.S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for a writ of habeas corpus was a case in a district court . . . . We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request. We reasoned, "[p]resentation of the petition for judicial action is the institution of a suit. Hence the denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy . . . ."

Id. at 1974-75.

[19] In the wake of Hohn, we must overrule Beeler and Kelly III's holding that a habeas corpus "case" is not pending until the habeas petition itself has been filed. Hohn's holding, as well as its reliance on Ex Parte Quirin that a threshold request for leave to file a petition for habeas corpus commences the habeas "case," is simply irreconciliable with

Beeler and Kelly III. Like a request for leave to file a habeas petition, a petition for the appointment of counsel to prepare and file a petition for a writ of habeas corpus, accompanied by a motion for a stay of execution under McFarland, is a threshold action that presents a "case" to the district court. By analogy to Hohn, it follows that a petition for appointment of counsel under McFarland creates a pending habeas case.7 Accordingly, we overrule those portions of Beeler and Kelly III that held that a habeas corpus case is pending only when the habeas petition itself has been filed. A petition for the appointment of counsel to prepare and file a habeas petition, coupled with a motion for a stay of execution, also suffices.

[20] Given this reading of Hohn and our partial overruling of Beeler and our overruling of Kelly III, it is clear that the AEDPA, including its statute of limitations, does not apply to the district court proceedings that Kelly filed in 1992 and 1993, i.e., cases No. CV 92-5420 TJH and No. CV 93-2951

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7 The dissent attempts to distinguish Hohn on the ground that, because the appointment of counsel is "mandatory" and "a stay of execution will usually be granted," the

"adversity" required by Hohn is missing. The attempt is misguided. First, the State could challenge whether the putative petitioner is "financially unable to obtain adequate representation," as required by 21 U.S.C. S 848(q)(4)(B) to be eligible for the appointment of counsel, an issue which would require ajudication. Second, the grant or denial of a stay of execution under 28 U.S.C. S 2251 is addressed to the discretion of the district court, again, requiring judicial resolution of the issue. While it may be correct that a stay of execution will usually be granted, it is not a ministerial or mandatory act. See McFarland, 512 U.S. at 858 ("Section 2251 does not mandate the entry of a stay but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court."). These circumstances meet the adversity requirement of Hohn. Indeed, Hohn makes no exception where the government acquiesces in the motion, relying instead on the adjudicative nature of the proceedings, rather than the actual course of litigation. See Hohn, 118 S. Ct. at 1976 ("It would have made no difference had the Government declined to oppose Hohn's application for a certificate of appealability. . . . [P]etitions for certiorari to this Court are often met with silence or even acquiescence; yet no one would suggest this deprives the petitions of the adversity needed to constitute a case.").

TJH. Those cases were dismissed by the district court under the compulsion of the writ of mandamus issued in Kelly III, which we have now overruled. Thus, in retrospect, the district court's decision to consider Kelly's habeas petitions on the merits is not clear error.8

[21] Under the circumstances of this case, one remedy

available to Kelly is to move in the district court to set aside those dismissals under Fed. R. Civ. P. 60(b)(6), 9 and to permit or deem the habeas petitions filed in district court cases No. CV 98-2722 TJH and No. CV 98-2723 TJH to be filed in the earlier-filed cases nunc pro tunc as of the date they were filed in the 1998 cases. See United States v. Alpine Land & Reser-voir, Co., 984 F.2d 1047, 1049 (9th Cir. 1993) (Rule 60(b)(6) applies "where extraordinary circumstances prevented a party from taking timely action"). Although such a motion is addressed to the discretion of the district court, id., because the original proceedings were dismissed under the compulsion of Kelly III and our mistaken holding in footnote 3 of Beeler, which we have now overruled, good and just cause would exist to set those dismissals aside.10

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8 Ironically, in its order that was the subject of Kelly III, the district court originally (and, in hindsight, correctly) held that the AEDPA did not apply to Kelly's petitions. See Kelly III, 127 F.3d at 783.

9 The rule provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment . . . for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6).

10 Since the dismissals were "based" on Kelly III, which has now been overruled, these circumstances also provide sufficient grounds under Fed. R. Civ. P. 60(b)(5) (which applies when a "a prior judgment upon which it [the dismissal] is based has been reversed or otherwise vacated") to set aside those dismissals. See Tomlin v. McDaniel, 865 F.2d 209, 211 (9th Cir. 1989).

5. Tolling

[22] In the alternative, we hold that it was not clear error as a matter of law for the district court to hold that Kelly's habeas petitions, filed in 1998, were not barred by the AEDPA's one-year statute of limitations. Indeed, the district court's finding that the statute of limitations should be equitably tolled under Beeler was clearly correct.

In Beeler, we held that the time bar of 28 U.S.C. S 2244(d)(1) can be tolled "if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." 128 F.3d at 1288-89 (citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1997)).

In its order of June 3, 1998, the district court "Ordered that the motions for equitable tolling be, and hereby is, Granted based on prior counsels' reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity." There are several reasons why this order is clearly correct, rather than clearly erroneous.

[23] First, on January 9, 1995, as part of its order that Kelly be mentally evaluated, the district court ordered "that all other aspects of this case be, and hereby are, Stayed pending final determination by this Court of the Petitioner's mental capacity to proceed." The only reasonable reading of this order was that it prohibited Kelly's attorneys from filing a habeas petition, which is how the district court itself construed it. Explaining its decision to grant equitable tolling in Kelly IV, the district court noted: "[T]his court indeed ordered a stay of all the proceedings other than the issue of the petitioner's sanity . . . . Reasonably, it could not be expected that counsel

would go forward [with filing the habeas petitions]." See also Kelly III, 127 F.3d at 788 ("Few things put the doing of an act so 'clearly beyond the prisoner's control,' as Beeler requires, as a court order prohibiting the doing of that act.") (Tashima, J., dissenting). This stay of the proceedings prevented Kelly's

counsel from filing a habeas petition and, in itself, justifies equitable tolling.

[24] Second, Kelly's alleged mental incompetency also justifies equitable tolling, at least until a reasonable period of time has elapsed after the district court makes a competency determination. The record discloses that Kelly has been having serious mental problems for many years. See id., at 788 & n.1. In fact, the State agreed that a hearing was necessary to determine his present competency. See id. at 788-89.11 Under 21 U.S.C. S 848(q)(4)(B), Kelly has a statutory right to counsel in his federal habeas proceeding. That right contemplates effective communication between lawyer and client. Murray v. Delo, 34 F.3d 1367, 1373 (8th Cir. 1994) ("We do not think Congress had in mind a lawyer who would not communicate with his or her client, or who would file a petition without consultation with or authorization from the client."). A putative habeas petitioner's mental incompetency -- a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control -- renders the petitioner unable to assist his attorney in the preparation of a habeas petition. Such a condition could eviscerate the statutory right to counsel. Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statute of limitations, and we reject

Kelly III's holding to the contrary. When a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination.

[25] Third, Kelly had timely, i.e., not subject to the AEDPA's statute of limitations, habeas proceedings pending at one time. As set forth in Part II.C.4, above, those proceedings were mistakenly dismissed, through no fault of Kelly,

---

11 Because of the writ of mandamus issued in Kelly III, the scheduled hearing on mental competency never took place.

under the compulsion of the writ of mandamus issued in Kelly III. This judicial error presents an independent ground to toll the statute of limitations, for it was our mistake that deprived Kelly of the opportunity to have his first federal habeas petitions considered on the merits.

For all of these reasons, the district court correctly held that Kelly's 1998 habeas petitions, i.e., those filed in cases No. CV 98-2722 TJH and No. CV 98-2723 TJH, were entitled to the benefit of the equitable tolling of the statute of limitations. Cf. Herring v. FDIC, 82 F.3d 284 (9th Cir.) ("We may affirm on any basis the record supports, including one the district court did not reach."), cert. denied, 117 S. Ct. 581 (1996).

In sum, the State has not demonstrated that the challenged orders of the district court are clearly erroneous as a matter of law.

III. Conclusion

We hold that Kelly's original habeas proceedings, filed in 1992 and 1993, were pending at the time the AEDPA was enacted. Therefore, the AEDPA, including S 2244(d)(1)'s statute of limitations, does not apply to Kelly's original federal habeas proceedings. In the alternative, we also hold that Kelly's 1998 habeas petitions are not barred by the AEDPA's statute of limitations because the district court correctly ruled that these petitions were entitled to the benefit of the equitable tolling of the statute of limitations. The State has failed to demonstrate that any of the five Bauman factors that are needed to support issuance of the writ of mandamus exists in this case. Accordingly,

The State's petition for a writ of mandamus is DENIED.

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THOMPSON, Circuit Judge, Specially Concurring.

I concur in the majority opinion except for the second and third reasons given for applying equitable tolling in Part II C 5.

I agree with the majority that because the district court's June 3, 1998 order stayed all proceedings other than the issue of Kelly's sanity, that order prevented Kelly's counsel from filing a habeas petition, and equitable tolling applies.

I do not agree, however, that Kelly's alleged mental incompetency equitably tolled the AEDPA's one-year statute of limitations, and I would not reach the question whether equitable tolling applies as a result of the dismissal of Kelly's habeas proceedings under the compulsion of the writ of mandamus issued in Kelly III.

SILVERMAN, Circuit Judge, with whom KOZINSKI, Circuit Judge, joins, Specially Concurring.

I agree with the majority that the AEDPA's statute of limitations never should have been applied to Kelly because, under the analysis of Hohn v. United States, 118 S.Ct. 1969 (1998), his habeas case was pending prior to the enactment of the AEDPA.

However, I write separately to express my disagreement with the majority's unnecessary and wholesale rejection of res judicata in the habeas context. Both Congress and the Supreme Court have made it clear that in the absence of unusual circumstances, habeas petitioners cannot continue to litigate issues that have been or could have been litigated already in habeas proceedings. When Congress amended S 2244 of the habeas corpus statute in 1966, it specifically stated that "the purpose of these new subsections is to add to section 2244 of title 28, United States Code, provisions for a

qualified application of the doctrine of res judicata." S.Rep.No. 89-1797, at 2 (1966) (emphasis added). The Supreme Court has agreed. See Calderon v. Thompson, 118 S.Ct. 1489, 1500-1501 (1998). See also Schlup v. Delo,

513 U.S. 298, 318-19 (1995) (successive petition standard is a "qualified application of res judicata"); Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996) ("the new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ'"); McCleskey v. Zant, 499 U.S. 467, 486 (1991) ("subparagraph (b) [to 28 U.S.C. S 2244] establishes a qualified application of res judicata").

By definition, a petition for writ of habeas corpus is a collateral attack on a final judgment. It is in that sense that res judicata does not apply to habeas corpus proceedings. That is a far cry from a rule of res judicata that prevents a habeas petitioner who has already litigated X in habeas proceeding from relitigating X in new habeas proceedings without good excuse. This case illustrates the problem. In 1992, Kelly started his first habeas proceeding by requesting the appointment of counsel. In 1997, after the AEDPA statute of limitations had run, the state moved to dismiss the proceedings on the grounds that no petition for writ of habeas corpus had ever been filed and that the time to file had run out. Kelly responded to the motion to dismiss with two arguments: First, that the AEDPA's statute of limitations did not apply to him; and second, that even if it did, the statute of limitations was equitably tolled by his incompetency. At no time did Kelly also claim equitable tolling based on his reliance on Judge Hatter's order. In fact, when this case was argued to the Kelly III panel, this revealing colloquy occurred:

> Judge Tashima: Suppose, suppose, we don't agree that this is a pending case. In other words, that the AEDPA does apply to this case. Your position then is what?

> Mr. Neuhoff, Kelly's counsel: Well, at that point, this Court is entitled to ... if there is any ground appearing in the record from which the district court's decision and its exercise of disretion can be upheld then the court can deny the writ [of mandamus sought by the state] on that basis and another ground here is equitable tolling.
>
> * * *
>
> Judge Tashima: What appears in the record to support that?
>
> Mr. Neuhoff: What appears in the record is that the district court has before it prima facie evidence, at least, that Mr. Kelly is: (a) incompetentto proceed and assist counsel in his habeas proceedings and (b) is incompetent to be executed.
>
> * * *1

Conspicuously absent was anything from Kelly's counsel along the lines of "... and (c) Kelly or his lawyers relied in good faith on Judge Hatter's order." Judge Hatter's order, which looms so large now, wasn't even mentioned.

The upshot of that oral argument was the decision in Kelly III holding that Kelly's incompetency did not constitute grounds for equitable tolling. After Kelly III was decided, the

1. Transcript of argument of Calderon v. U.S.D.C. (Kelly), ("Kelly III"), September 5, 1997 at 13.

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state again moved the district court to dismiss Kelly's habeas proceedings as time-barred. This time, for the first time, Kelly raised Judge Hatter's order as a basis for equitable tolling.

One can only wonder how many additional theories of equitable tolling Kelly had in reserve. One must also wonder how this court could possibly permit him to litigate one of his grounds for equitable tolling and then, after he loses, to raise additional grounds for equitable tolling of which he was previously aware. The record in this case is devoid of any explanation of why Kelly's counsel did not raise the currently proffered ground for equitable tolling earlier, either in response to the state's motion to dismiss in the district court or in connection with the petition for writ of mandamus in this court in Kelly III. As a result, in my view, he is barred from belatedly raising it now unless his default is excused by a showing of cause and prejudice or manifest injustice.

The problem raised by the Supreme Court's decision in Hohn is a different matter. "[A] court should not reopen issues decided in earlier stages of the same litigation. The doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." Agostini v. Felton, 117 S.Ct. 1997 (1997) (citations and internal quotation marks omitted). The Supreme Court's decision in Hohn, handed down after both Kelly III and Kelly IV were decided, demonstrates that Kelly should not have been deemed barred from filing his petition for writ of habeas corpus by

the AEDPA statute of limitations in the first place. It would be unjust to persist in that error.

HALL, Circuit Judge, Dissenting.

The majority opinion expresses clear disdain for the fact that the AEDPA's statute of limitations bars Kelly from filing

a first habeas petition. Unfortunately, the statute of limitations is the law.

First, the majority finds that all five factors enumerated in Bauman v. United States Dist. Ct., 557 F.2d 650, 654-55 (9th Cir. 1977), counsel against the issuance of mandamus. However, this is no ordinary mandamus action. Kelly IV was simply an action to enforce the mandate of Kelly III, a decision the District Court chose to ignore. It is hornbook law that mandamus "is available to a party who has prevailed in this Court if the lower court does not proceed to execute the mandate, or disobeys and mistakes its meaning." Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427 (1978); see also Citizens National Trust & Savings Bank of Los Angeles v. United States Dist. Ct., 215 F.2d 799, 800 (9th Cir. 1954) (holding that a petition for mandamus is appropriate where the District Court "violated the plain provisions of our mandate").

The real issue is whether the District Court did or did not violate this court's mandate. While the majority deems this issue "most complex," the simple fact is that the District

Court allowed Kelly to file a habeas petition after this court held that such a petition was time-barred. I can conceive of no clearer violation of this court's mandate. The majority concludes that Kelly should not be precluded from filing a habeas petition because res judicata does not apply to habeas petitions, but as the panel decision made clear, "[Kelly's] prior cases did not involve true habeas corpus petition proceedings. He never got that far." Calderon v. United States Dist. Ct. (Kelly), No. 98-70569, slip op. at 5996 (9th Cir. June 9, 1998) ("Kelly IV"). Allowing Kelly to file a habeas petition after this court held he could not flagrantly undermines any respect for the finality of this court's judgments.

The majority also makes much of the fact, in its discussion of "abuse of the writ," that it was the state that selected the issues to be decided in Kelly III's mandamus proceeding. This fact is wholly irrelevant. Res judicata "prevents litigation of

all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1529 (9th Cir. 1985) (emphasis added). There is no indication that any of the defenses to the statute of limitations were unavailable at the time of Kelly III. Kelly cannot and should not be allowed to "sandbag" the judicial process by withholding defenses and presenting them seriatim whenever he requires a delay of his execution.

While I dissent from the entire opinion as it stands, I wish to point out that the portion of the opinion from which I dissent above is in fact dictum. The majority does not use

its carefully crafted (but misguided) interpretation of res judicata and abuse of the writ in order to provide Kelly with a new basis for equitable tolling of the statute of limitations. Instead, the majority simply goes on to hold that the statute of limitations does not apply to Kelly at all. This holding does not depend upon the application of res judicata or abuse of the writ but upon the majority's misapplication of a recent Supreme Court case. The majority employs an overbroad interpretation of the Supreme Court's opinion in Hohn v. United States, 118 S. Ct. 1969 (1998), to overrule Kelly IV, Kelly III, and ultimately a portion of Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 118 S. Ct. 899, 1389 (1998). At the heart of the majority's error is its unreflective act of equating the word "case" as used in Hohn with the word "case" as used in Beeler; the words may appear the same, but their meanings are vastly different.

In Hohn, the Supreme Court decided whether a court of appeals decision denying an application for a certificate of appealability under 28 U.S.C. S 1253(c) constituted a "case" for purposes of Supreme Court jurisdiction under 28 U.S.C. 1254 and the "case or controversy" requirement of Article III.

See 118 S. Ct. at 1972. In Beeler, on the other hand, this court decided that a request for appointment of counsel and stay of execution did not constitute a habeas "case" for purposes of the AEDPA's statute of limitations. Hohn was therefore using the word "case" to interpret whether the Supreme Court had jurisdiction while Beeler was using the word "case" to interpret whether a statute of limitations had run. This distinction is crucial.

Beeler expressly held (a holding that the en banc majority does not disturb) that the AEDPA's statute of limitations was not jurisdictional. 128 F.3d at 1287-89. Indeed, the availability of equitable tolling, which the majority recognizes, depends upon the fact that the AEDPA's statute of limitations is not jurisdictional. See id. Thus, Hohn's use of the word "case" cannot overrule Beeler's use of the word "case" because the two courts were using this word in completely different contexts to mean completely different things.

Even if Hohn and Beeler were using the word "case" to mean the exact same thing (which they were not), the cases are so factually distinguishable as to belie the argument that one "has vitiated" the other. In Hohn, the Supreme Court merely stated that a habeas corpus petition that had been ruled upon in the District Court but denied a certificate of appealability remained a case for purposes of a petition for certiorari. The case before us deals with a request for counsel and a stay of execution where no habeas petition had been filed, and thus there was nothing that could "remain" a case. 1

---

1 The majority, in a judicial sleight-of-hand that also undermines the AEDPA's statute of limitations, holds that this court may deem the habeas petitions filed after the AEDPA's effective date as having been filed nunc pro tunc before that date in order to avoid reaching the issue of equitable tolling. See n.7, supra. This does not change the fact, however, that when the request for counsel and stay of execution were made, no habeas petition had been filed.

The majority overlooks another underlying rationale in Hohn: that a certificate of appealability involves adversity. See 118 S. Ct. at 1972. By overlooking this rationale, the majority can in conclusory fashion state that a petition for appointment of counsel accompanied by a motion for a stay of execution is a "case," even though indigents have the mandatory right to counsel under 21 U.S.C. S 848(q)(4)(B), see McFarland v. Scott, 512 U.S. 849, 854 (1994), and a stay of execution will usually be granted to allow counsel "meaningfully to research and present a defendant's habeas claims." Id. at 858. Because the request for counsel and a stay did not involve true adversary proceedings, I would hold that, even if Hohn's definition of a "case" applied to the proceedings before us (which it does not), no such case had been initiated before the statute of limitations expired.

For the reasons above, I respectfully dissent.

APPENDIX 7

APPENDIX 7

1.) Section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, appearing in Chapter 153 of Title 28 of United States Code § 2244, provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A)the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B)the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United State is removed, if the applicant was prevented from filing by such State action;

(C)the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D)the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2)The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall

not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1).

2.) Title 21 of the U.S.C. § 848(q)(4) provides in relevant part:

(B)In any post conviction proceeding under 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

21 U.S.C. § 848(B).

3.) Commencement of Action, Rules of Civil Procedure, Rule 3.

A civil action is commenced by filing a complaint with the court.

Supreme Court, U.S.
FILED
MAR 15 1999
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No. 98-1082

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARTHUR CALDERON, WARDEN, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent*,

HORACE EDWARDS KELLY, *Real Party in Interest.*

ON WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent*,

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PETITIONER'S SUPPLEMENTAL BRIEF

Since the filing of the Petition for Writ of Certiorari, the United States Court of Appeals for the Sixth Circuit has delivered an opinion which is in direct conflict with the Ninth Circuit opinion below on the question of whether a petition for appointment of counsel initiates a habeas case for the purpose of determining if the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies.

In Williams v. Coyle, ___ F.3d ___, 1999 WL 64556 *3 (6th Cir.), the court considered whether this Court's opinion in Hohn v. United States, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998), required that a request for the appointment of counsel under 21 U.S.C. § 848(q)(4)(B) prior to the effective date of the AEDPA resulted in the case being pending and therefore outside the scope of the AEDPA. In rejecting this argument and holding that the AEDPA applied unless a petition for writ of habeas corpus had been filed prior to the statute's effective date the court specifically disagreed with the Ninth Circuit opinion below.

> Recently, the Ninth Circuit, sitting en banc, overruled its earlier precedent and held that a petition for the appointment of counsel does initiate a habeas case for the purposes of Lindh. See Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal., --- F.3d ---, No. 98-70569, 163 F.3d 530, 1998 WL 848032, at *9-11 (9th Cir. Dec.8, 1998). The Calderon court concluded that this determination was compelled by the Supreme Court's recent decision in Hohn v.

> United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). We disagree that Hohn requires this result.

Williams v. Coyle, ___ F.3d ___ 1999 WL 64556 at *3

In light of the above there is now a real and intolerable conflict between the Courts of Appeals on this issue which has been presented as Question 2 in the Petition for Writ of Certiorari now pending before this Court. Unless certiorari is granted federal habeas petitioners who filed petitions on the same date would have their claims considered under different rules depending upon which federal court had jurisdiction.

CONCLUSION

Accordingly, this Court should issue a writ of certiorari.

Dated: March 10, 1999.

Respectfully submitted,

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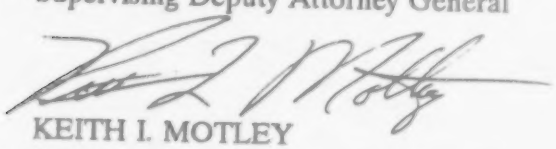

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OCTOBER TERM, 1998

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UNITED STATES DISTRICT COURT, *Respondent.*

HORACE EDWARDS KELLY, *Real Party In Interest*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Does the Court of Appeals' recognition that res judicata is not an absolute bar to its own reconsideration of timeliness issues erroneously resolved against a habeas petitioner in earlier mandate proceedings raise critical, unresolved legal issues that merit certiorari?

2. Does the Court of Appeals' definition of the meaning of the term "pending case" to include habeas petitioners who have filed requests for appointment of counsel present a sufficiently significant conflict with the decisions of other Circuits to merit certiorari, given the fact that the resolution of this issue: (a) is irrelevant to the ultimate outcome of this case, (b) affects a finite and diminishing number of cases, and (c) reflects still developing issues of law surrounding the interpretation of this Court's decision in Hohn v. United States, 524 U.S. 236, 118 S. Ct. 1969 (1998)?

3. Does the District Court's appropriate exercise of its discretion to toll the statute of limitations contained in 28 U.S.C. § 2244(d)(1) based on court orders that precluded the filing of a habeas petition, or for a reasonable period following litigation over the threshold issue of a habeas petitioner's competence, raise critical, unresolved legal issues that merit certiorari?

4. Does the mere fact that the District Court made its equitable tolling determination following expiration of the one year period set forth in 28 U.S.C. § 2244(d)(1) raise critical, unresolved legal issues that merit certiorari?

LIST OF PARTIES

The parties to this action are Petitioner Warden Arthur Calderon ("the Warden"), Respondent United States District Court for the Central District of California ("the District Court"), and Real Party in Interest Horace Edwards Kelly ("Mr. Kelly").

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INTRODUCTION

The Warden's certiorari petition is premised on a single, fundamental error: that the Court of Appeals is powerless to correct factual and legal errors that resulted in the dismissal of Mr. Kelly's federal habeas proceedings before he had an opportunity to file his first habeas petition. In Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (Kelly V),[1] the en banc Court of Appeals determined that Mr. Kelly should be allowed to litigate the first habeas petitions filed on his behalf in April 1998, both because the District Court had made orders that prevented Mr. Kelly from filing these petitions at any earlier date, and because the statute of limitations contained in Chapter 153 of the ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 110 Stat. 1214 ("AEDPA") was not applicable to Mr. Kelly.

In reaching this conclusion, the en banc Court of Appeals reversed an earlier panel decision in Calderon v United States District Court (Kelly), 127 F.3d 782 (9th Cir. 1997) ("Kelly III"). The Kelly III panel had granted a writ of mandamus, reversing the District Court's denial of the Warden's motion to dismiss Mr. Kelly's habeas proceedings as untimely under 28 U.S.C. § 2244(d)(1). The District Court had expressly reserved ruling on the issue of equitable tolling, holding only that the AEDPA was inapplicable to Mr. Kelly, and the Warden argued to the Kelly

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[1] Mr. Kelly was convicted and sentenced to death by the Riverside Superior Court and the San Bernardino Superior Court. The Court of Appeals has denominated as "Kelly I" and "Kelly II," the decisions of the California Supreme Court upholding those convictions on direct review. The Court of Appeals has denominated as "Kelly III," a 1997 decision granting the Warden's mandamus petition from the District Court's denial of the Warden's motion to dismiss. The Court of Appeals has denominated as "Kelly IV," a subsequent panel decision granting in part and denying in part the Warden's subsequent mandamus petition, which sought dismissal of petitions filed on Mr. Kelly's behalf in April 1998. The Court of Appeals has denominated as "Kelly V," the en banc court's decision denying this second mandamus petition. For the convenience of the Court, these same titles are employed in this Opposition.

III panel that the issue of equitable tolling was not properly before it. Nevertheless, the Kelly III panel ruled that the AEDPA was applicable to Mr. Kelly and that Mr. Kelly was not entitled to an indefinite grant of equitable tolling until he regained competence.

After the Kelly III opinion was rendered, events demonstrated that the panel had erred in ruling on equitable tolling without a factual determination on this issue from the District Court. In an order issued on June 3, 1998, the District Court ruled for the first time that prior orders, which stayed proceedings pending a determination on Mr. Kelly's competence, prevented Mr. Kelly's attorneys from filing habeas petitions on his behalf. Chief District Judge Terry J. Hatter, Jr. explained that

> what actually occurred was that this court indeed ordered a stay of all the proceeding[s] other than the issue of the Petitioner's sanity. Reasonably, it could not be expected that counsel would go forward. As critical as this court has been of prior counsel in some instances, it would be unfair to them to rule other than I intend to rule today. And it isn't just counsel that I'm concerned with, but the fairness, of course, goes directly to their client. Their client would be adversely affected if, indeed because counsel, following the court's order[...]the order, as I say, was that it would be a stay of all proceedings other than the issue of petitioner's sanity, and that is what occurred. And since that is what occurred, I'm going to grant the motion for equitable tolling.

(Transcript of June 3, 1998 Hearing in Kelly v. Calderon, CV 98-2722-TJH and CV 98-2723-TJH (C.D.Cal, June 3, 1998), attached hereto as Appendix 1, at 19.)

In light of this ruling, the correctness of the Kelly V holding on equitable tolling is not open to serious question. Moreover, as the en banc court correctly determined in Kelly V, this Court's opinion in Hohn v. United States, 118 S. Ct. 1969 (1998), required reversal of the Kelly III panel's determination that the AEDPA was applicable to Mr. Kelly, since his habeas

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proceedings had been pending and vigorously litigated on his behalf for more than three years before the enactment of that statute.[2]

The Warden's attempt to invoke the Court of Appeals' past, erroneous ruling in Kelly III to prevent Mr. Kelly from ever litigating his first federal habeas petitions finds no support in the statutes and precedents governing federal habeas proceedings and should be rejected. The Court of Appeals correctly held in Kelly V that none of the doctrines of finality applicable to habeas proceedings precluded it from revisiting the issue of equitable tolling, which could not have been definitively resolved on the limited record before the Court of Appeals in Kelly III, and that the en banc court could properly reconsider the applicability of the AEDPA in light of Hohn. Accordingly, the Warden's Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

In 1986, Mr. Kelly was convicted and sentenced to death by the Riverside County Superior Court. On November 26, 1990, that conviction was affirmed by the California Supreme Court. People v. Kelly, 51 Cal.3d 931, 800 P.2d 516, 275 Cal.Rptr. 160 (1990) cert. denied, Kelly v. California, 502 U.S. 842, 112 S. Ct. 134, 116 L.Ed.2d 101 (1991) ("Kelly I"). In 1988, Mr. Kelly also was convicted and sentenced to death by the San Bernardino County Superior Court. On January 16, 1992, that conviction was affirmed by the California Supreme Court. People v. Kelly, 1 Cal.4th 495, 822 P.2d 385, 3 Cal.Rptr.2d 677 (1992) cert. denied, Kelly v. California, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992) ("Kelly II").

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[2] Even if this latter determination was erroneous, it would not be a proper ground for certiorari. The en banc court's resolution of the applicability of the AEDPA is irrelevant to the ultimate outcome of the case, affects a finite and diminishing class of litigants, and reflects the still developing law on this issue that has followed this Court's decision in Hohn v. United States.

On January 13, 1993, the United States District Court for the Central District of California ("the District Court") appointed federal habeas counsel to represent Mr. Kelly in federal habeas proceedings challenging his Riverside conviction and death sentence, and his San Bernardino conviction and death sentence on June 4, 1993. However, because of Mr. Kelly's diagnosed schizophrenia, his competence was at issue.[3]

On January 6, 1995, the District Court entered an order staying proceedings on all issues other than Mr. Kelly's competence. The District Court advised Mr. Kelly's habeas counsel that they were not to undertake any work on preparation of his habeas petitions, and that they would not be paid for such work, until after these competency issues had been resolved.

Over the course of the next two and a half years, the parties engaged in continuous litigation over the issue of Mr. Kelly's competence and the best means to resolve it. The Warden repeatedly insisted that the issue of Mr. Kelly's competence had to be resolved before any habeas petitions could be filed on Mr. Kelly's behalf, and that the lack of any determination by the district court regarding Mr. Kelly's competence prevented Mr. Kelly, or anyone acting on his behalf, from filing and litigating habeas petitions. Despite continuous litigation over this issue, the District Court failed to finally resolve the question of whether or not Mr. Kelly was competent to authorize a petition to be filed on his behalf.[4] (See Docket of Proceedings Before

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[3] On August 31, 1992, Warden Daniel Vasquez declared a doubt as to Mr. Kelly's competence to be executed and proceedings commenced in Marin County Superior Court on this issue. These proceedings were suspended upon the filing of a request for federal habeas counsel, when the District Court issued an order staying Mr. Kelly's execution.

[4] In 1996, as a result of court-ordered settlement negotiations, the parties agreed that the issue of Mr. Kelly's competence would be submitted for resolution to a Marin County jury, pursuant to California's scheme for determining competence to be executed, prior to any determination of Mr. Kelly's other claims. After Mr. Kelly had gone through the process of

(continued...)

the United States District Court for the Central District of California in Kelly v. Vasquez, CV 92-5420 TJH and CV 93-2951 TJH, attached hereto as Appendix 2.)

On May 2, 1997, while the issue of Mr. Kelly's competence remained pending, the Warden moved to dismiss Mr. Kelly's habeas proceedings as untimely under the one year statute of limitations contained in Chapter 153 of the AEDPA, codified at 28 U.S.C. § 2244(d)(1). On June 17, 1997, the District Court denied the Warden's motion to dismiss, concluding that the AEDPA was inapplicable to Mr. Kelly. However, the District Court declined to resolve the issue of whether the statute of limitations contained in the AEDPA was tolled.

On July 3, 1997, the Warden filed a Petition for Writ of Mandamus seeking review of the District Court's June 17, 1997 Order denying the Warden's motion to dismiss. In his mandamus petition, the Warden argued solely that the District Court had erred in holding that the AEDPA was inapplicable to Mr. Kelly. At oral argument before the Court of Appeals, the Warden insisted that any request for equitable tolling was premature and that the issue of equitable tolling was not properly before the appellate court. (Transcript of September 5, 1997 Oral Argument before Court of Appeals in Calderon v. United States District Court, Case No. 97-70875, attached hereto as Appendix 3 at 3, 6, and 7.)

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[4](...continued)
having the federal stay lifted so an execution date could be set, the Warden suddenly announced his decision that Mr. Kelly had regained his sanity after years of serious mental illness. The Warden's good faith in reneging on this agreement is subject to question. Throughout 1996, as the statute of limitations contained in 28 U.S.C. § 2244(d)(1)(A) was ticking away, the Warden never once mentioned that he would assert the statute as a defense, despite the fact that negotiations as to the form of the competency determination continued. It was only in February of 1997, after the Warden reneged on his promise to resolve the issue of Mr. Kelly's competence through state proceedings, that the Warden even raised the statute as a potential bar.

In an order issued on August 26, 1997, the District Court again declined to determine whether or not the statute of limitations contained in the AEDPA should be equitably tolled, without prejudice to the reassertion of equitable tolling claims following the Court of Appeals' ruling on the Warden's pending mandate petition.

On September 18, 1997, a three judge panel of the Court of Appeals issued a decision granting the Warden's petition for writ of mandate. Calderon v. United States District Court, 127 F.3d 782 (9th Cir. 1997) cert. denied, 118 S. Ct. 1396 (1998) ("Kelly III"). The Court of Appeals concluded that the AEDPA's statute of limitations was applicable to Mr. Kelly, because he had no case pending at the time the AEDPA became effective. Id. at 785. The Court of Appeals held that the filing of a request for appointment of counsel did not commence a case under the AEDPA and that, for purposes of that statute, a case only commenced upon the filing of a habeas petition. Id.

Notwithstanding the District Court's express refusal to reach issues of equitable tolling, the Court of Appeals also concluded that an indefinite grant of equitable tolling for the period of Mr. Kelly's incompetence was not justified based on the limited record before it. Id. at 786-87. Accordingly, the Court of Appeals ordered the District Court to grant the Warden's motion to dismiss for failure to comply with the statute of limitations contained in the AEDPA. Id. The Kelly III decision noted that a claim challenging Mr. Kelly's competence to be executed could be brought at a later date, if this issue arose in the future. Id. at 787.

On February 6, 1998, the District Court dismissed Mr. Kelly's habeas proceedings and lifted the stays preventing his execution. The San Bernardino and Riverside Superior Courts both set April 14, 1998, as the date for Mr. Kelly's execution. On March 17, 1998, the Warden

notified the Marin County District Attorney that he had good reason to believe that Mr. Kelly may have become incompetent to be executed and proceedings commenced in the Marin County Superior Court on that issue.

On April 6, 1998, Mr. Kelly's current federal habeas counsel filed two petitions on his behalf challenging the constitutionality of his convictions and death sentences by the Riverside and San Bernardino Superior Courts, and also challenging Mr. Kelly's competence to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). Contemporaneously with the filing of these petitions, Mr. Kelly's current habeas counsel filed a motion for equitable tolling based on several grounds, including prior court orders that precluded the filing of a habeas petition, and for a finite period while the threshold issue of Mr. Kelly's competence was being litigated.

On May 18, 1998, the District Court denied the Warden's motion to dismiss Mr. Kelly's habeas petitions. On May 26, 1998, the Warden filed another Petition for Writ of Mandate with the Court of Appeals challenging the District Court's denial of his motion to dismiss. On June 3, 1998, following the conclusion of competency proceedings before the Marin County Superior Court, the District Court granted Mr. Kelly's motion for equitable tolling.[5] (Order, Kelly v. Calderon, Case Nos. CV 98-2722 TJH and CV 98-2723 TJH (C.D.Cal., June 3, 1998) attached hereto as Appendix 4). The District Court concluded that equitable tolling was appropriate

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[5] On May 15, 1998, a Marin County jury concluded by a vote of 9 to 3 that Mr. Kelly was competent to be executed. In its May 26, 1998 mandate petition, the Warden sought dismissal of federal habeas proceedings to clear the way for Mr. Kelly's execution under a death warrant issued by the San Bernardino Superior Court, which had set Mr. Kelly's execution for June 9, 1998. In its June 3, 1998 order, the District Court allowed the amendment of Mr. Kelly's habeas petitions to raise claims challenging the constitutionality of recently concluded state court proceedings regarding Mr. Kelly's competence to be executed.

"based on prior counsel's reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity." Id. at 1.[6]

On June 9, 1998, a three judge panel of the Court of Appeals issued an opinion that granted in part and denied in part the Warden's mandate petition. (Appendix 5 to Warden's Petition for Writ of Certiorari). The Court of Appeals held that under principles of res judicata, all arguments in favor of equitable tolling were barred by its prior decision in Kelly III. Id. at 31-33. However, the Court of Appeals held that Mr. Kelly could pursue claims that he was incompetent to be executed under Ford v. Wainwright. Id. at 34 n. 4.

On June 26, 1998, a majority of the active members of the Court of Appeals voted to rehear en banc the Warden's mandate petition, and the Kelly IV opinion was withdrawn. On December 8, 1998, by a vote of ten to one, an en banc panel of the Court of Appeals issued an opinion denying the Warden's mandate petition. Calderon v. United States District Court, 163 F.3d 530 (9th Cir. 1998) ("Kelly V").

In rejecting the Warden's request for mandamus relief, the Court of Appeals concluded that the Warden had failed to satisfy the stringent standards for mandate relief established in Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). 163 F.3d at 534-42. The Court of Appeals observed that regardless of whether or not the decision below was erroneous:

> the prejudice the State seeks to avoid cannot be avoided. A delay in Kelly's execution is inevitable. To be sure, the extent of the delay may depend on whether the district court considers only Kelly's Ford [v. Wainwright] claim, or whether it considers all of Kelly's claims. At this point, however, the special

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[6] As previously noted, a transcript of the hearing on Mr. Kelly's motion for equitable tolling is attached hereto as Appendix 1.

> need for mandamus is...vitiated, because the writ cannot really give the State the relief it desires.

Id. at 536.

The en banc court also concluded that the Warden had failed to demonstrate that the District Court's orders on his motion to dismiss and on Mr. Kelly's motion for equitable tolling were clearly erroneous. The Court of Appeals held (1) that res judicata did not bar the District Court from considering claims contained in Mr. Kelly's habeas petitions because res judicata is inapplicable to habeas proceedings; (2) that law of the case principles did not bar the en banc court from reconsidering the prior orders of a three judge panel; and (3) that Mr. Kelly's habeas petitions did not constitute an abuse of the writ or violate the AEDPA's limitations on the filing of successive petitions because they were his first habeas petitions. Id. at 537-39.

The en banc court held that Mr. Kelly's first habeas petitions were timely because, under Hohn v. United States, 118 S. Ct. 1969 (1998), his requests for appointment of counsel and stays of execution in 1992 and 1993 created habeas cases that were pending at the time the AEDPA was enacted. Id. at 539-40. As an alternative ground for its holding, the Court of Appeals concluded that the District Court did not abuse its discretion in concluding that Mr. Kelly was entitled to equitable tolling. The Court of Appeals found ample support for this decision, based upon prior court orders that precluded Mr. Kelly's counsel from filing habeas petitions. Id. at 541. The Court of Appeals also concluded that Mr. Kelly was entitled to equitable tolling for a reasonable time following a determination on his competence to authorize the filing of federal habeas petitions. Id. Finally, the en banc court concluded that the District Court's mistaken dismissal of Mr. Kelly's habeas proceedings, based on the Court of Appeals' erroneous

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conclusion that the AEDPA was inapplicable to Mr. Kelly, supplied a third ground for a grant of equitable tolling. Id. at 541-42.

REASONS FOR DENYING THE WRIT

Through his certiorari petition, the Warden seeks review of the Court of Appeals' denial of extraordinary writ relief from a non-appealable order of the District Court that fell well within the District Court's discretion under settled principles of habeas jurisprudence. In this context, the Warden's petition is a singularly inappropriate candidate for certiorari. As described in more detail below, the en banc opinion in Kelly V does not present issues of sufficient importance to merit certiorari. The central holding of Kelly V, that res judicata does not bar consideration of claims in a first habeas petition, is an unremarkable restatement of well-settled principles of habeas jurisprudence. Moreover, even if this Court wished to depart from these settled principles to announce new res judicata principles applicable to habeas petitioners, this case would be an inappropriate vehicle for such a decision. In the limited mandate proceedings before the Court of Appeals in Kelly III, Mr. Kelly did not have a full and fair opportunity to litigate issues of equitable tolling--an issue that the district court had expressly reserved ruling on.

The other holdings of Kelly V also do not merit certiorari. This Court does not need to grant certiorari to review the unremarkable proposition that equitable tolling is available when court orders prevent the filing of a habeas petition, or for a reasonable period after the litigation of issues that the parties agree must be resolved before a petition can be filed. Finally, the Kelly V decision does not create a conflict with the decisions of other Courts of Appeals on the applicability of the AEDPA that would merit certiorari.

First, the Court of Appeals' reasoning on this irrelevant to the outcome of this case, since the en banc court's decision on equitable tolling formed a sufficient basis for denial of the Warden's mandamus petition. Second, this issue is not a matter of sufficient importance to merit review, since it affects a finite and rapidly decreasing number of habeas petitioners. Lastly, there is no immediate need for this court to exercise its certiorari jurisdiction to resolve any conflict, since the law on this issue is likely to further develop. Only one other Circuit has had an opportunity to address this subject since this Court issued its decision in Hohn v. United States. See Williams v. Coyle, ___ F.3d ___, 1999 WL 65446 (6th Cir. 1999). Given that fact, other Circuits should be afforded a similar opportunity to interpret the AEDPA in light of Hohn. For all of these reasons, the Warden's certiorari petition should be denied.

ARGUMENT

I. The Court Of Appeals' Resolution of the Res Judicata Issue Does Not Merit Certiorari.

A. The Court of Appeals Correctly Concluded that Strict Principles of Res Judicata are Not Applicable to Habeas Proceedings.

In holding that it possessed the power to revisit the issue of the timeliness of Mr. Kelly's claims, the en banc court reaffirmed the "longstanding rule that res judicata has no application in habeas corpus." Kelly V, 163 F.3d at 537. See also McCleskey v. Zant, 499 U.S. 467, 479, 480 (1991) (noting that "at common law, res judicata did not attach to a court's denial of habeas relief" and that this principle was reaffirmed by the Supreme Court in Salinger v. Losiel, 265 U.S. 224, 230 (1924)). This holding is an unsurprising application of this Court's own precedents. See, e.g., Sanders v. United States, 373 U.S. 1, 7-8 (1963) ("the

familiar principle that res judicata is inapplicable to habeas proceedings" has been a principle of habeas corpus "from the earliest days of federal habeas corpus" and "has become settled in an unbroken line of decisions"). See also Schlup v. Delo, 513 U.S. 298, 320 (1995) ("This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata").

In place of the formal application of principles of res judicata, federal courts and Congress have adopted rules of finality in habeas proceedings through

> the gradual evolution of...formal judicial, statutory or rule based doctrines of law...[that] seek to maintain the court's freedom to issue the writ, aptly described as the 'highest safeguard of liberty,' while at the same time avoiding serious, improper delay, expense, complexity and interference with a state's interest in the finality of its own legal processes.

Lonchar v. Thomas, 517 U.S. 314, 322 (1996).

The finality of decisions made in habeas cases are protected by the law of the case doctrine and rules limiting the assertion of successive habeas petitions. See, e.g., Dobbs v. Zant, 506 U.S. 357 (1993) (manifest injustice exception to law of the case doctrine required consideration of evidence on issue resolved against petitioner on prior habeas petition); 28 U.S.C. § 2244(b) (placing limits on the filing of successive petitions); McCleskey v. Zant, 499 U.S. 467, 494 (1991) (limiting the consideration of successive petitions under the abuse of the writ doctrine). The en banc court correctly recognized that these doctrines did not prevent it from revisiting its erroneous decision in Kelly III. Kelly V, 163 F.3d at 537-39.

The Warden nevertheless urges this Court to extend principles of res judicata to preclude the District Court's consideration of Mr. Kelly's first petition, in contravention of this Court's

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own precedents. As this Court noted in Lonchar v. Thomas, such an ad hoc departure from settled rules is

> particularly inappropriate...when dismissal of a first petition is at issue. Dismissal of a first petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important issue in human liberty.

517 U.S. at 324.[7]

B. This Case is Not an Appropriate Vehicle for Reassessment of the Applicability of Res Judicata to Habeas Petitioners.

Even if this Court wished to extend principles of res judicata to create new restrictions for habeas petitioners, the unique procedural posture of this case makes the application of res judicata to Mr. Kelly singularly inappropriate. The doctrine of res judicata does not apply "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." Kremer v. Chemical Construction Co. 456 U.S. 461, 481 (1983).

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[7] The Warden cites Calderon v. Thompson, 118 S. Ct. 1489 (1998), as authority for the proposition that the en banc court erred in revisiting the panel decision in Kelly III. The relevance of Thompson to this case is unclear. In Thompson, the Court of Appeals issued a decision to recall its mandate after full litigation of a federal habeas petition before the District Court, the Court of Appeals, and this Court. In this case, the en banc court merely revisited a timeliness determination made on the limited record presented on the Warden's mandate petition. In contrast to the habeas petitioner in Thompson, Mr. Kelly has not "had extensive review of his claims in federal or state court." Thompson, 118 S. Ct at 1502. Due to District Court orders that prevented him from filing and litigating his first petition while the threshold issue of his competency remained unresolved, Mr. Kelly has not had any federal review of his claims. As this Court noted in Lonchar, the dismissal of a first habeas petition before Mr. Kelly has had any review of his federal claims is a particularly serious matter, which places this case in a very different posture from Thompson.

Given the limited scope of the mandamus review sought by the Warden, the Kelly III court did not and could not afford Mr. Kelly a full and fair opportunity to litigate all potential issues of equitable tolling on appeal. As the en banc court noted in Kelly V,

> It was the State that sought mandamus and set the agenda, i.e., selected the issues to be contested before the court of appeals. We think the reversal of the litigant's positions, combined with the transfer of the agenda setting power to the State, made Kelly's opportunity to respond to the petition for writ of mandate an inadequate substitute for a first habeas petition.

Kelly V, 163 F.3d at 538.

In Kelly III, the Warden petitioned for mandamus from a District Court order that held solely that the AEDPA was inapplicable to Mr. Kelly. In his petition, the Warden argued only that the District Court erred in so ruling. At oral argument before the Kelly III panel, the Warden correctly observed that the issue of equitable tolling, which was still pending before the District Court, was not properly before the Court of Appeals. Appendix 3 at 3, 6 and 7.

The Court of Appeals was empowered to affirm the district court's ruling denying the Warden's motion to dismiss on any grounds that were squarely presented by the record. Board of Trustees of Construction Laborer's Trust for Southern California v. M.M. Sundt Construction Co., 37 F.3d 1419, 1420 (9th Cir. 1994).[8] However, in the absence of any findings from the

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[8] In fact, the Kelly III Court considered and rejected the sole alternative ground presented by Petitioner's counsel in support of the District Court's ruling: that mental incompetence, standing alone, justified an indefinite grant of equitable tolling. 127 F.3d at 786-87. At oral argument, Judge Fernandez opined that he could properly reach this issue, because it constituted a pure issue of law. Judge Fernandez observed:

> [Whether lack of competence is a basis for equitable tolling] sounds to me like an almost purely legal question. The question that was actually presented to the California Supreme Court at one point is: if a person is incompetent to aid counsel in post-conviction proceedings, would or are the proceedings tolled?....That's a straight legal question. It doesn't even need any facts developed, does it?

(continued...)

District Court on the issue of equitable tolling, the Kelly III Court was not in a position to definitively resolve fact-intensive issues of equitable tolling that lay within the discretion of the District Court against Mr. Kelly, as Real Party in Interest, and against the District Court, as Respondent. See Supermail Cargo, Inc. v. U.S., 68 F.3d 1204, 1206 (9th Cir. 1995) (question of equitable tolling is ordinarily a fact-intensive inquiry that often involves matters outside the pleadings) ; EEOC v. Kentucky State Police Department, 80 F.3d 1086, 1094 (6th Cir. 1996) (district court's determination on equitable tolling is entitled to review under an abuse of discretion standard); Dixon v. Shalala, 54 F.3d 1019, 1030 (2nd Cir. 1995) (same).

The grounds for equitable tolling asserted by Mr. Kelly's current counsel are highly fact-dependent and were not amenable to resolution as a matter of law by the Kelly III panel in the first instance on the limited record presented to it. Moreover, the ability of the Kelly III panel to definitively resolve these issues was thwarted by the District Court's failure to make any determinations on the appropriateness of equitable tolling.

This fact is amply demonstrated by the Kelly III panel's ineffectual debate over the meaning of the District Court's orders. In considering the District Court's January 9, 1995, order, which stayed proceedings pending a determination of Mr. Kelly's competency, the Kelly III majority took the dissent to task, insisting that there was "not the slightest hint that the order was intended to, or did, preclude the filing of a habeas corpus application by Kelly." Kelly III,

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[1](...continued)

Appendix 3 at 14-15.

In contrast, the grounds accepted by the en banc court in Kelly V involve factual issues that could not be resolved on the limited record presented on the Warden's mandamus petition in Kelly III.

127 F.3d at 787 n. 2. In reality, the panel did not and could not know the answer to this question; only the district court knew what it intended when it made this order, and how the parties could reasonably interpret its rulings in light of the extensive proceedings over the course of several years that preceded the Kelly III decision. In ruling on Mr. Kelly's subsequent motion for equitable tolling, Chief District Judge Terry J. Hatter, Jr., clarified that

> what actually occurred was that this court indeed ordered a stay of all the proceeding[s] other than the issue of the Petitioner's sanity. Reasonably, it could not be expected that counsel would go forward. As critical as this court has been of prior counsel in some instances, it would be unfair to them to rule other than I intend to rule today. And it isn't just counsel that I'm concerned with, but the fairness, of course, goes directly to their client. Their client would be adversely affected if, indeed because counsel, following the court's order[...]the order, as I say, was that it would be a stay of all proceedings other than the issue of petitioner's sanity, and that is what occurred. And since that is what occurred, I'm going to grant the motion for equitable tolling.

Appendix 1 at 19.

As this example demonstrates, in the limited context of the mandate proceedings at issue in Kelly III, Mr. Kelly could not and did not receive a full and fair opportunity to litigate equitable tolling on issues that were not clearly delineated by the limited record before the Court of Appeals. Accordingly, even if this Court wished to apply new res judicata rules to habeas petitioners, Mr. Kelly's case would not be an appropriate vehicle for such a ruling.

II. The Court Of Appeals' Resolution of the Equitable Tolling Issue Does Not Merit Certiorari.

A. The Court of Appeals' Determination of the Merits of Mr. Kelly's Equitable Tolling Claims Was Unremarkable.

The Court of Appeals' resolution of the equitable tolling issue presented to it reflects an unexceptional application of well-settled principles of law. In denying mandate from the District

Court's order on this issue, the en banc court concluded that "it was not a clear error as a matter of law for the district court to hold that Kelly's habeas petitions, filed in 1998, were not barred by the AEDPA's one-year statute of limitations." Kelly V, 163 F.3d at 541.

The Court of Appeals concluded that equitable tolling was appropriate based upon the District Court's conclusion that its own orders "prohibited Kelly's attorneys from filing a habeas petition" and for a reasonable period following a threshold determination on Mr. Kelly's competence. Id.

The District Court's use of equitable tolling in this context is unremarkable. A party may rely on a district court order, even if that order is erroneous, as a sufficient basis for equitable tolling. See, e.g., United States v. Albertini, 830 F.2d 985, 989 (9th Cir. 1987). Even when a time limitation is jurisdictional, and not simply a statute of limitations, reliance on an incorrect court order is a justification for acceptance of an otherwise untimely filing. See Thompson v. I.N.S., 375 U.S. 384, 386 (1964), citing Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962); see also Hernandez-Rivera v. I.N.S., 630 F.2d 1352, 1354 (9th Cir. 1980); United Artists Corp. v. La Cage Aux Follies, Inc., 771 F.2d 1265, 1269-1270 (9th Cir. 1985) (late filing of appeal); Browning v. American Tele. & Tele. Paradyne, 120 F.3d 222, 227 (8th Cir. 1997), citing Carlile v. South Routt School District RE 3-J, 652 F.2d 981 (10th Cir. 1981). Furthermore, if a court "lulled [petitioner] into inactivity" through its orders, tolling is appropriate. Sidebottom v. Delo, 46 F.3d 744 (8th Cir. 1995).

The en banc court's conclusion that equitable tolling was appropriate for a reasonable time after resolution of the threshold issue of Mr. Kelly's competence is similarly unremarkable on the unique facts of this case. As previously noted, both the District Court and the Warden

insisted that Mr. Kelly's competency was a threshold determination that had to be adjudicated before a habeas petition could be filed. Kelly V, 163 F.3d at 541. Given this fact, it is not surprising that the Court of Appeals concluded that "it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination." Id.

B. The Timing of the District Court's Ruling on Equitable Tolling Was Unobjectionable.

The Warden also objects to the timing of the District Court's order on equitable tolling, which came after the statute of limitations had expired. This objection is ironic, given the Warden's insistence at oral argument before the Court of Appeals in Kelly III that Mr. Kelly could not seek equitable tolling until after the statute of limitations had expired. Appendix 3, at 4 and 9. It is also utterly without merit. Not surprisingly, many grants of equitable tolling are made after the statute of limitations has expired. See, e.g., Bowen v. City of New York, 476 U.S. 467 (1986) (social security claimants properly moved for equitable tolling after expiration of statute of limitations); Ramadan v. Chase Manhattan Corporation, 156 F.3d 499 (9th Cir. 1998) (plaintiff properly moved for equitable tolling after Truth in Lending Act statute of limitations expired). Federal courts have expressly permitted inmates seeking equitable tolling of the AEDPA's statute of limitations to file motions after the statute of limitations otherwise would have expired. See, e.g., Miller v. New Jersey State Department of Corrections, 145 F.3d 616 (3rd Cir. 1998) (inmate was entitled to file request for extension of time to file habeas after expiration of AEDPA statute of limitations based upon equitable tolling). The Warden cites no authority, and to counsel's knowledge none exists, that suggests that this practice is in any way improper.

III. The Court of Appeals' Resolution of the Applicability of the AEDPA to Mr. Kelly Does Not Merit Certiorari.

A. This Determination is Not Sufficiently Important to Warrant Review.

1. The Court of Appeals' Determination on This Issue is Irrelevant to the Outcome of This Case.

Certiorari is not appropriate to review the applicability of the AEDPA to Mr. Kelly's case, since whatever the resolution of this issue, the decision on the merits of the Warden's claims will be the same. Assuming arguendo that the AEDPA is applicable to Mr. Kelly, his entitlement to equitable tolling of the statute of limitations based on court orders that prevented the timely filing of his petitions is not open to serious question. Thus, whether Mr. Kelly's case falls within or outside the operation of the AEDPA, the Court of Appeals correctly denied the extraordinary relief sought by the Warden.

In their treatise on Supreme Court practice, Professors Stern, Gressman, Shapiro and Geller have noted that "[i]f the resolution of a clear conflict is irrelevant to the ultimate outcome of a case before the Court, certiorari may be denied." ROBERT L. STERN, EUGENE GRESSMAN, STEVEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE, § 4.4 at 173 (7th Ed. 1993). As this Court stated in Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959),

> While this Court decides issues of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the [alleged conflict among circuit court decisions]...can await a day when the issue is posed less abstractly.

Id. at 184.

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Consistent with this principle, the Warden's failure to demonstrate the existence of a dispositive conflict on the issue of the applicability of the AEDPA justifies denial of certiorari.

2. The En Banc Court's Decision is Narrow and Unique.

The Warden grossly overstates the importance and impact of that portion of the Kelly V opinion holding that Mr. Kelly's request for appointment of counsel created a "case" within the meaning of Hohn. In reality, the Hohn issue is not a matter of sufficient importance to merit review as it affects a finite and rapidly decreasing number of habeas cases.

As the en banc court recognized, "[T]his case [came to them] in an unusual procedural posture, complicated by an atypical history." Kelly V, 163 F.3d at 532. Indeed, the courts have spent most of the last several years attempting to grapple with issues unique to this case, viz., the degree to which Mr. Kelly's severe mental illness prevents him from rationally assisting his attorneys in litigating his federal habeas corpus petitions. Significantly, it was the Warden who first declared a doubt as to Mr. Kelly's competency. This factor alone separates Mr. Kelly's case from every other case in which the applicability of the AEDPA has been argued.

Finally, since the class of habeas petitioners affected by the decision of the en banc court is finite and rapidly decreasing, the mere passage of time will render this issue moot. See, e.g., Williams v. Coyle, __ F.3d __, 1999 WL 64556 (6th Cir. 1999) (Once all cases in which a petitioner initiated some habeas corpus-related legal action prior to the effective date of the AEDPA have been resolved, the point at which a § 2254 case is "filed" will become irrelevant). The Warden's portrayal of the Kelly V holding as having sweeping consequences is specious and unsupportable. In view of the limited class of cases affected by Kelly V, issuance of a writ of certiorari would bring issues before this Court that are not appropriate subjects for certiorari.

3. This Court Should Decline to Exercise its Jurisdiction to Allow The Lower Courts to Interpret the Holding in Hohn.

The court below held that Mr. Kelly's first habeas petitions were timely because, under Hohn v. United States, 118 S. Ct. 1969 (1998), his requests for appointment of counsel and applications for stay of execution in 1992 and 1993 qualified as "cases" that were pending at the time the AEDPA was enacted. Id. at 539-40. As a result, the Warden avers that a conflict now exists among the circuit courts with respect to whether an application for appointment of counsel pursuant to 21 U.S.C. § 848(q) creates a pending case within the meaning of Hohn. This purported conflict between jurisdictions is irrelevant to the outcome of the case.

The Warden correctly notes that prior to the issuance of the circuit's opinion in Kelly V, every court that ruled on the issue of whether a request for counsel and stay created a case within the meaning of 848(q) came to the contrary conclusion. See Holman v. Gilmore, 126 F.3d 876 (7th Cir.1997), cert. denied, 118 S. Ct. 1169; Williams v. Cain 125 F.3d 269 (5th Cir. 1997), cert. denied, 118 S. Ct. 2338; Nobles v. Johnson, 127 F.3d 409 (5th Cir.1997), cert. denied, 118 S. Ct. 1389; Kelly III, 127 F.3d 782, cert. denied, 118 S.Ct. 1395. The Warden pays lip service to the fact that each of these cases was decided prior to this Court's holding in Hohn. However, this fact alone is fatal to his argument and this Court should decline to exercise its jurisdiction.

On February 12, 1999, after the Warden filed the present writ of certiorari, the United States Court of Appeals for the Sixth Circuit decided Williams v. Coyle , __ F.3d __, 1999 WL 64556 (6th Cir. 1999). In Williams, the court held that a habeas case is not pending within the meaning of Lindh until the application for the writ is filed pursuant to 28 U.S.C. § 2242. Id. at 6. In rejecting the reasoning of the Ninth Circuit en banc court, the Williams panel relied in part on

Sixth Circuit precedent that the "McFarland interpretation of 'pending'...extends no further than is necessary to give effect to 21 U.S.C. § 848(q)(4)(B)." Id. at 8. As a result, the Sixth Circuit confined Hohn to its facts and limited its holding to a determination that the rejection by the district court of a certificate of appealability constitutes an appealable order. Id. at 9.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on matters among the federal courts of appeals. Hence a square and irreconcilable conflict is usually needed to secure review. See McElroy v. United States, 455 U.S. 642, 643 (1982); Marks v. United States, 430 U.S. 188, 189 (1977). Moreover, to merit review the conflict must also be on an important issue. See, e.g., Commissioner v. Factor, 364 U.S. 932 (1961). In this regard, the issue presented by the present case, i.e., whether a case is pending within the meaning of the AEDPA, is unlikely to recur and lacks vitality. Indeed, this Court often denies certiorari because an issue lacks vitality even when, unlike here, the issue is pending in a substantial number of similar cases. See ROBERT L. STERN, EUGENE GRESSMAN, STEVEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE, § 4.4 at 168 (7th Ed. 1993). Here, only two lower courts have had occasion to apply this Court's holding in Hohn to the statute of limitations contained in the AEDPA. Given the rapidly diminishing number of cases affected by the holding of the Ninth Circuit, this Court should decline to exercise its jurisdiction.

Finally, this Court usually permits tolerable conflicts to go unaddressed until more than two courts of appeal have considered a question. As a result, this Court should allow the issue to percolate through the lower courts before accepting it for review. See McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied when issue requires further study in lower courts before it is addressed by this Court); Gilliard v. Mississippi, 464 U.S. 867 (1983)

(this Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem). For that reason, the circuits should be permitted the opportunity to fully develop and adequately frame the issues sought to be resolved by this Court before the question is accepted for review.

B. The Decision of the Court Below is Correct and in Harmony with the Precedents of This Court.

The opinion in Hohn stands for the proposition that this Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability under 28 U.S.C. § 2253(c). Hohn, 118 S. Ct. at 1971. In reaching this narrow holding, this Court relied on its prior decision in Ex Parte Quirin, supra. Of particular relevance to the Court of Appeals was the following passage from Hohn:

> In Ex Parte Quirin, 317 U.S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for writ of habeas corpus was a case in a district court....We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request.

118 S.Ct. at 1974.

In the wake of Hohn and specifically this Court's reliance on the holding of Ex Parte Quirin, that a threshold request for leave to file a petition for habeas corpus commences the habeas "case," ten judges of the en banc court found Hohn's reasoning irreconcilable with its prior holdings in Calderon v. United States District Court (Beeler), 128 F.3d 1283 (9th Cir. 1997), and Kelly III.[9] There is nothing remarkable about an en banc court revisiting a prior

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[9] Judges Kozinski, Thompson and Trott, who comprised the Beeler panel, all joined in that part of Kelly V that overruled Beeler's holding that a case is pending within the meaning of

(continued...)

decision if it believes that decision to be erroneous. See, e.g., Agostini v. Felton, 117 S. Ct. 1997 (1997).

In attempting to distinguish Hohn, the Warden notes that this Court analyzed the meaning of the word "case" to determine whether it had jurisdiction over a certificate of appealability, rather than to determine the reach of the AEDPA's statute of limitations. This is a distinction without a difference. Regardless of the legal question posed, the word "case" means "a proceeding in court, a suit, or action." Blyew v. United States, 80 U.S. 581, 13 Wall. 581, 20 L.Ed. 638 (1871). We must, as Justice Holmes stated, "accept the plain meaning of plain words." United States v. Brown, 206 U.S. 240, 244 (1907). In this context, the word case retains the same meaning, regardless of whether it is used to interpret a statute of limitations or a jurisdictional issue.

The Warden also erroneously contends that unless the AEDPA is applied to habeas cases in which a request for appointment of counsel has been filed before the effective date of the Act, the purposes of the AEDPA will be thwarted. In Lindh v. Murphy, 117 S. Ct. 2059 (1997), this Court rejected a similar argument that Chapter 153 had to be applied retroactively to cases filed before the Act's effective date in order to satisfy the intentions of the AEDPA's framers. To apply Chapter 153 to individuals like Mr. Kelly, who have engaged in extensive, protracted litigation before the enactment of the AEDPA, would conflict with the essential holding of Lindh that "the new provisions of Chapter 153 generally apply only to cases filed after the Act became effective." 117 S. Ct. at 2068. In this case, Mr. Kelly engaged in continuous litigation for more

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[9](...continued)
the AEDPA only when a petition for writ of habeas corpus has been filed. 163 F.3d at 539-40; id at 542 (Thompson, J., concurring); id. at 542-44 (Silverman, J. concurring). Judge Kozinski, who authored the Beeler opinion, joined Judge Silverman's concurrence.

than three years prior to the enactment of the AEDPA. See Appendix 2. To hold that Mr. Kelly had no pending habeas case before the enactment of the AEDPA would contradict the very record of the case below. Cf., Williams v. Coyle, supra, 1998 WL 64556 at *1 (AEDPA held applicable in case in which petitioner-appellant requested counsel only six days before enactment of AEDPA).

The lone dissenting judge in Kelly V raised additional, but equally meritless objections to the en banc court's resolution of this issue. First, the dissent argued that even if Hohn and Beeler were using the word "case" to mean the exact same thing, the cases are "so factually distinguishable as to belie the argument that one has vitiated the other." Kelly V, 163 F.3d at 545. However, the dissent's reliance on the fact that a habeas petition had been ruled upon in Hohn but had been denied a certificate of appealability, while contrarily no habeas petition was filed by Mr. Kelly prior to the correlative triggering event for creation of his "case", is misplaced. The fact that the petitioner in Hohn must have already filed a petition for writ of habeas corpus in order to make a request for a certificate of appealability was not the basis for the court's determination that such a request constitutes a case.

Instead, the tie that binds Hohn and Kelly V is that neither an application for certificate of appealability nor a request for appointment of counsel should be regarded as threshold inquiries separate from the merits, but rather as judicial proceedings to resolve cases or controversies within the meaning of Article III of the Constitution. The dissent's bald assertion that a request for counsel and a stay lack adversity is without merit. Thus, the decision of the Court of Appeals, being indisputably in harmony with Hohn, leaves in its wake no special or

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important reason for this Court to review it under the standard set forth in Rule 17.1 of this Court.

CONCLUSION

The Warden's certiorari petition raises no worthy issues for review. The Kelly V decision appropriately applied long-established principles of finality governing habeas cases to determine that the en banc Court of Appeals possessed the authority to evaluate the timeliness of Mr. Kelly's first federal habeas petitions. The Court of Appeals then correctly applied well-settled principles to determine that equitable tolling was appropriate based upon prior court orders that prevented Mr. Kelly's filing of his first federal habeas petitions. The en banc court also correctly applied this Court's recent decision in Hohn v. United States to conclude that Mr. Kelly's case was not governed by the AEDPA, since Mr. Kelly had been represented by federal habeas counsel in hotly contested habeas proceedings for several years preceding the enactment of that statute.

While the Warden alleges that this last holding creates a conflict with the decisions of other Circuits that justifies certiorari, this contention lacks merit. This issue is irrelevant to the ultimate outcome of this case, since the en banc court's resolution of the equitable tolling issue is sufficient to justify its denial of the Warden's mandate request. This issue is not a matter of sufficient importance to justify certiorari, since it affects a finite and diminishing number of

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habeas petitioners. Finally, this issue does not merit certiorari, since the law on this issue is still developing in light of this Court's recent decision in Hohn v. United States.

For all of these reasons, the Warden's Petition for Writ of Certiorari should be denied.

Dated: March 2, 1999

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

HARRY W. SIMON
Deputy Federal Public Defender

David W. Fermino by Harry W. Simon

DAVID W. FERMINO
Deputy Federal Public Defender

Counsel for Real Party In Interest

APPENDIX 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - - - -

HONORABLE TERRY J. HATTER, CHIEF JUDGE PRESIDING

- - - - - -

HORACE EDWARD KELLY,

PETITIONER,

VS.

ARTHUR CALDERON, ETC.,

RESPONDENT.

CASE NO. CV-98-2722-TJH
CV-98-2723-TJH

COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

WEDNESDAY, JUNE 3, 1998

MARY TUCKER, CSR 9308
OFFICIAL COURT REPORTER
440 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIF. 90012
213/687-0530

APPEARANCES:

FOR THE PETITIONER:

OFFICE OF THE FEDERAL PUBLIC DEFENDER
MARIA E. STRATTON
FEDERAL PUBLIC DEFENDER
DAVID W. FERMINO
DEPUTY FEDERAL PUBLIC DEFENDER
HARRY SIMON
DEPUTY FEDERAL PUBLIC DEFENDER
255 EAST TEMPLE STREET
SUITE 167
LOS ANGELES, CALIFORNIA 90012

FOR THE RESPONDENT:

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
KEITH I. MOTLEY
SUPERVISING DEPUTY ATTORNEY GENERAL
110 WEST A STREET
SUITE 1100
SAN DIEGO, CALIFORNIA 92101

LOS ANGELES, CALIFORNIA; WEDNESDAY, JUNE 3, 1998

(2:00 P.M.)

THE CLERK: CIVIL 98-2722 AND CIVIL 98-2723, KELLY V. CALDERON.

COUNSEL, PLEASE MAKE YOUR APPEARANCES.

MR. FERMINO: DAVID FERMINO AND HARRY SIMON, OFFICE OF THE FEDERAL PUBLIC DEFENDER ON BEHALF OF HORACE KELLY.

THE COURT: THANK YOU.

MR. MOTLEY: KEITH MOTLEY, DEPUTY ATTORNEY GENERAL FOR RESPONDENT.

THE COURT: THANK YOU, MR. MOTELY.

WHY DON'T YOU PROCEED.

MR. FERMINO: GOOD AFTERNOON, YOUR HONOR.

THE COURT: GOOD AFTERNOON.

MR. FERMINO: AT THE OUTSET, WE WOULD LIKE TO ALERT THE COURT TO A COUPLE OF HOUSEKEEPING MATTERS, INCLUDING SOME, FOR LACK OF A BETTER WORD, MISTAKES WITH RESPECT TO THE AMENDED PETITION THAT WE FILED, AND WE WOULD LIKE TO HAVE THOSE MISTAKES CORRECTED.

WE MISTAKENLY INTERLINEATED CLAIM -- THE SANITY CLAIM THAT'S CONTAINED IN THE PETITION BEFORE -- THE AMENDED PETITION ON THE BELIEF THAT IT WAS IDENTICAL TO THE PROCEDURAL WRIT THAT WAS PENDING BEFORE THE CALIFORNIA SUPREME COURT. THAT CLAIM IS CONTAINED IN THE RIVERSIDE

PETITION BETWEEN PAGES 223 AND 284, AND IT IS IN VOLUME TWO OF THE SAN BERNARDINO PETITION BETWEEN PAGES 311 AND 379.

BOTH OF THOSE CLAIMS HAVE FOOTNOTES, FOOTNOTE 46 IN THE RIVERSIDE PETITION, AND FOOTNOTE 53 IN THE SAN BERNARDINO PETITION, THAT EXPLAIN OUR THEORY AS TO WHY WE INTERLINEATED THAT CLAIM. AND WHAT WE WOULD LIKE THE COURT TO DO IS TO ACCEPT FOR FILING THAT PETITION. WE WILL REFILE THE CLAIM WITHOUT THE INTERLINEATION FOR THE CONVENIENCE OF THE COURT, BUT WE WOULD LIKE THE COURT TO CONSIDER THAT CLAIM AS THE SUBSTANTIVE FORD CLAIM AND THEN THE CLAIM THAT WE APPENDED TO THE AMENDED PETITION AS THE CLAIM BROUGHT IN THE CALIFORNIA SUPREME COURT BASED ON THE SANITY PROCEEDINGS IN MARIN COUNTY.

THE COURT: ALL RIGHT.

DID YOU WISH TO BE HEARD REGARDING THIS REQUEST?

MR. MOTLEY: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. FERMINO: MOVING ON, YOUR HONOR. THIS IS AN ABSOLUTELY GRAVE MATTER. OUR CLIENT IS SCHEDULED TO BE EXECUTED JUST AFTER MIDNIGHT ON MONDAY. AND WE ARE HERE ASKING THE COURT FOR A STAY ON THE PETITIONS AND THE FORD CLAIMS PENDING IN THIS COURT AND ON OUR MOTION FOR EQUITABLE TOLLING.

TO TAKE THOSE IN TURN, WE -- FIRST, I'D LIKE TO POINT OUT THAT THE CALIFORNIA SUPREME COURT, AS THE COURT

IS PROBABLY AWARE, DENIED BOTH THE WRIT TAKEN FROM THE SANITY PROCEEDINGS IN MARIN COUNTY, AS WELL AS THE SAN BERNARDINO HABEAS PETITION THAT WAS PENDING IN THAT COURT.

THE COURT: MR. MOTLEY WAS KIND ENOUGH TO FAX US BOTH OF THOSE RESULTS.

MR. FERMINO: AS A RESULT, YOUR HONOR, WE BELIEVE THAT THE FORD CLAIM THAT IS PENDING BEFORE THIS COURT IS NOW COMPLETELY EXHAUSTED, AND THAT A STAY CAN PROPERLY ISSUE FOR THIS COURT TO CONSIDER THAT CLAIM IN AN ORDERLY FASHION.

WE BELIEVE THAT THE BASIS FOR THAT STAY IS NOT ONLY THE MARTINEZ-VILLAREAL OPINION FROM THE UNITED STATES SUPREME COURT THAT SAYS THAT A PETITIONER IN MR. KELLY'S POSITION IS ENTITLED TO FEDERAL REVIEW OF THAT CLAIM, BUT ALSO THE NINTH CIRCUIT IN KELLY ONE SPECIFICALLY INVITED PETITIONER TO BRING THAT FORD CLAIM BACK BEFORE THIS COURT.

AND REGARDLESS OF WHAT THIS COURT'S ULTIMATE POSITION IS WITH RESPECT TO THE OTHER CLAIMS CONTAINED IN THE PETITION, AND WE WILL ADDRESS THOSE SHORTLY, WE BELIEVE THAT THE FORD CLAIM IS NOW PROPERLY BEFORE THIS COURT.

WITH RESPECT TO THE SUBSTANCE OF THAT CLAIM, THAT IS THE CLAIM THAT GOES TO THE PROCEDURAL NATURE OF THE PROCEEDINGS IN MARIN COUNTY, OUR ARGUMENT IS, YOUR HONOR, THAT THE STATE PROCESS WAS FATALLY FLAWED.

WE BELIEVE THAT THE INSTRUCTIONS THAT WERE GIVEN WERE INCORRECT AND THAT THE TRIAL COURT REFUSED TO ENTERTAIN REPEATED REQUESTS FROM COUNSEL FOR THE DEFENSE TO REQUIRE THE JURY TO APPLY A DEFINITION THAT INCLUDED A LEVEL OF COGNITION THAT WAS FAR GREATER THAN SIMPLE AWARENESS; THAT IS, KTHAT MR. KELLY HAD TO HAVE AN UNDERSTANDING BEYOND SIMPLE AWARENESS OF THE EXECUTION AND WHAT WAS TO GO OCCUR IN ITS AFTERMATH.

ADDITIONALLY, WE BELIEVE THE JURY ENGAGED IN PREJUDICIAL MISCONDUCT. THERE WERE -- THERE HAS BEEN A SUBSEQUENT JURY INVESTIGATION WHICH HAS REVEALED ALL SORTS OF PREJUDICIAL MISCONDUCT THAT THIS COURT, I BELIEVE, WOULD DISCOVER UPON REVIEW AND WOULD RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION.

OBVIOUSLY, THERE ARE OTHER PROBLEMS THAT WE HAVE DISCOVERED WITH RESPECT TO THE PROCEEDINGS AND THAT IS PRECISELY THE REASON WHY THIS COURT OUGHT TO ENTERTAIN SIGNIFICANT REVIEW OF THOSE PROCEEDINGS.

THERE IS A 3,000 PAGE TRANSCRIPT WHICH THERE -- IT IS ABSOLUTELY IMPOSSIBLE FOR THIS COURT TO TODAY MAKE A DECISION WITH RESPECT TO THE FORD CLAIM OR EVEN WITHIN TIME FOR THE DATE OF JUNE 9TH WHICH IS WHEN THE STATE OF CALIFORNIA WOULD LIKE TO PUT MR. KELLY TO DEATH.

WE HAVE DETAILED ALL OF THESE DEFICIENCIES IN THE CLAIM THAT WAS FILED BEFORE THE CALIFORNIA SUPREME COURT AS

PART OF OUR SANITY WRIT, AND THAT CLAIM IS NOW PART OF THE AMENDED PETITION BEFORE THIS COURT.

I THINK THAT THERE ARE SORT OF OVERRIDING, IF YOU WILL, ATMOSPHERIC ISSUES WITH RESPECT TO THE SANITY PROCEEDINGS THAT OCCURRED IN MARIN COUNTY. WE SHOULD BE CLEAR ABOUT WHAT IS HAPPENING HERE.

IF WE DO NOT RECEIVE A STAY, MR. KELLY WILL BE EXECUTED WITHOUT FEDERAL REVIEW OF HIS UNDERLYING CONVICTIONS, AS WELL AS THE SANITY PROCEEDINGS IN MARIN COUNTY. HE WILL BECOME THE FIRST PERSON IN THE NATION TO BE EXECUTED WITHOUT FEDERAL REVIEW. AND IT IS NOT WITHOUT ITS IRONY THAT HE WILL BE THE FIRST AFRICAN-AMERICAN IN CALIFORNIA TO BE EXECUTED SINCE ARRON MITCHELL, WHO INCIDENTALLY WAS ALSO DENIED FEDERAL REVIEW OF HIS CONVICTION AND SENTENCE.

MOVING TO THE EQUITABLE TOLLING, IF THERE AREN'T QUESTIONS FROM THE COURT. WE HAVE BROUGHT ROUGHLY SIXTY CLAIMS FOR EQUITABLE TOLLING -- EXCUSE ME, SIXTY CLAIMS FOR RELIEF IN OUR PETITION. THESE CLAIMS ARE PROPERLY BEFORE THIS COURT. THE NINTH CIRCUIT, AS I MENTIONED IN OUR PRIOR HEARINGS, DECIDED A VERY NARROW ISSUE, AND THAT WAS WHETHER INCOMPETENCY OF MR. KELLY WAS GROUNDS FOR AN INDEFINITE STAY OF THE PROCEEDINGS IN ORDER TO DETERMINE WHETHER, IF EVER, MR. KELLY WOULD BECOME SANE WITHIN THE MEANING OF THE STATUTE.

THE NINTH CIRCUIT DID NOT DECIDE ANY OTHER ISSUE, ANY OTHER BASIS. THEY DECIDED AS A MATTER OF LAW THAT MR. KELLY WAS NOT ENTITLED TO TOLLING FOR THAT REASON.

WE FILED A SUPPLEMENTAL BRIEF WITH THIS COURT WITH ADDITIONAL FACTUAL SUPPORT FOR OUR CLAIM THAT HE IS ENTITLED TO EQUITABLE TOLLING. INCLUDED IN THAT IS A TRANSCRIPT OF THE ORAL ARGUMENT THAT OCCURRED IN THE NINTH CIRCUIT WHERE RESPONDENT TOOK THE POSITION THAT WE OUGHT TO DO JUST WHAT WE ARE DOING HERE TODAY.

WE FILED A PETITION AND NOW WE ARE ASKING THIS COURT TO ENTERTAIN A MOTION FOR EQUITABLE TOLLING WITH RESPECT TO THE CLAIMS THAT ARE CONSIDERED IN THAT PETITION -- THAT ARE CONTAINED IN THAT PETITION.

THIS IS NOT UNLIKE ANY OTHER CIVIL CASE THAT COMES BEFORE THIS COURT OR ANY OTHER FEDERAL DISTRICT COURT. THAT IS, MOST STATUTE OF LIMITATIONS QUESTIONS ARISE IN THE CONTEXT OF PARTIES WHO HAVE ESSENTIALLY MISSED THE DEADLINE AND COME TO COURT HAVING FILED A COMPLAINT OF SOME KIND AND ASK THE COURT TO TOLL THE STATUTE OF LIMITATIONS TO ALLOW THEM TO FILE. WE ARE IN AN IDENTICAL POSITION. THIS COURT, I THINK, HAS THE POWER AND THE AUTHORITY TO ENTERTAIN THE MOTION AND TO GRANT EQUITABLE TOLLING WITH RESPECT TO THE CLAIMS.

THE NINTH CIRCUIT DURING THE LAST FEW WEEKS HAS GRANTED -- OR ACTUALLY DURING THE LAST WEEK, ORDERED THE

PARTIES TO BRIEF WITH -- THE WRIT THAT THE ATTORNEY GENERAL FILED FROM YOUR HONOR'S DENIAL OF THEIR MOTION TO DISMISS IN OUR LAST HEARING. WE BELIEVE THAT DOES NOT REMOVE JURISDICTION FROM THIS COURT TO ENTERTAIN OUR MOTION FOR EQUITABLE TOLLING. AND I THINK, IN FACT, THE RECORD NEEDS TO BE DEVELOPED AS TO WHAT HAPPENED IN THIS COURTROOM WHEN MR. DEBLANC AND MR. GRACE WERE REPRESENTING MR. KELLY.

YOUR HONOR IS IN THE BEST POSITION OF TELLING THE CIRCUIT, OF MAKING A RECORD AS TO WHAT YOUR ORDERS MEANT, AND WHETHER OR NOT COUNSELS' ACTIONS WERE REASONABLE IN LIGHT OF THOSE ORDERS.

SO WE BELIEVE THAT THIS COURT OUGHT TO MAKE A RECORD WITH RESPECT TO WHAT HAPPENED IN THE COURT AND WHAT HAPPENED WITH RESPECT TO THOSE CLAIMS.

IN THAT REGARD, YOUR HONOR, WE FILED WITH OUR FIRST EQUITABLE TOLLING MOTION A PROPOSED ORDER WHICH CONTAINED ROUGHLY NINE PROPOSED FINDINGS OF FACT WITH RESPECT TO WHAT OCCURRED IN THOSE PRIOR PROCEEDINGS.

I WOULD LIKE TO GO THROUGH THAT PROPOSED ORDER SO THE COURT IS AWARE OF WHAT WAS PLACED BEFORE THE COURT.

NUMBER ONE, IN FAILING TO FILE A FEDERAL HABEAS PETITION PRIOR TO APRIL 6, 1998, PETITIONER'S COUNSEL ACTED WITH DUE DILIGENCE AND REASONABLY, JUSTIFIABLY, AND IN GOOD FAITH RELIED UPON THE COURT'S PREVIOUS ORDERS AND THE REPRESENTATIONS AND ACTIONS OF RESPONDENT'S COUNSEL.

TWO, THE COURT'S ORDERS OF DECEMBER 19, 1994 AND JANUARY 9, 1995 AND JULY 17, 1995, AS WELL AS THE PLEADINGS ON FILE AND THE HEARINGS HELD IN THIS MATTER, DIRECTED PETITIONER'S COUNSEL NOT TO PREPARE ANY HABEAS CORPUS PETITIONS UNTIL AFTER THE ISSUE OF PETITIONER'S COMPETENCE HAD BEEN RESOLVED.

THREE, ON JANUARY 9, 1995, THIS COURT ORDERED AN EVALUATION OF PETITIONER'S COMPETENCY TO PROCEED, APPOINTED DR. DAVID KESSLER FOR SUCH A PURPOSE, AND STAYED ALL FURTHER PROCEEDINGS PENDING A FINAL DETERMINATION OF COMPETENCE.

FOUR, BY AND THROUGH ITS PLEADINGS AND ARGUMENTS IN THIS COURT, RESPONDENT'S COUNSEL REPRESENTED THAT PETITIONER'S COUNSEL COULD NOT FILE A HABEAS PETITION ON PETITIONER'S BEHALF UNTIL AFTER THE ISSUE OF PETITIONER'S COMPETENCE HAD BEEN RESOLVED.

FIVE, RESPONDENT'S SETTLEMENT OF THIS MATTER WITHOUT FILING A PETITION AND REPRESENTED THAT THE PARTIES WOULD RESOLVE THE ISSUE OF PETITIONER'S COMPETENCE THROUGH PROCEEDINGS IN MARIN COUNTY SUPERIOR COURT AND UNDER CALIFORNIA PENAL CODE SECTION 3701.

SIX, DURING THE PENDENCY OF THIS LITIGATION IT WAS UNCERTAIN WHETHER THE PROVISIONS OF THE NEWLY ENACTED ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 APPLIED TO PETITIONER'S CASE, OR WHETHER PETITIONER'S

INCOMPETENCY TO PROCEED WAS TOLLED DURING ANY PERIOD OF INCOMPETENCY.

AND, SEVEN, FINALLY, THESE CIRCUMSTANCES, THE ORDERS OF THIS COURT AND THE REPRESENTATIONS OF RESPONDENT'S COUNSEL, ALL LED COUNSEL TO JUSTIFIABLY BELIEVE THAT NO PETITIONS COULD BE FILED UNTIL PETITIONER'S COMPETENCY TO PROCEED WAS DETERMINED, AND THAT PROVISIONS OF THE A.E.D.P.A. DID NOT APPLY TO PETITIONER'S MATTER.

WE BELIEVE THAT'S AN ACCURATE RECITAL OF WHAT OCCURRED IN THIS COURT AND WHAT LED THE PARTIES IN THIS CASE NOT ONLY THROUGH THE ORDERS OF THIS COURT, BUT THE ACTION OF RESPONDENT, TO NOT FILE A PETITION WITHIN THE TIME THE STATUTE OF LIMITATIONS AS PRESCRIBED IN THE A.E.D.P.A., AND AS SUCH, THIS COURT SHOULD GRANT EQUITABLE TOLLING WITH RESPECT TO THOSE CLAIMS.

WE BELIEVE, YOUR HONOR, THAT THAT'S THE RIGHT THING TO DO HERE. IT IS THE JUST THING TO DO HERE. AND IT IS THE CORRECT THING TO DO UNDER THE LAW.

THE COURT: ALL RIGHT. WHY DON'T I HEAR FROM THE STATE BEFORE WE MOVE ANY FURTHER.

MR. MOTLEY: THANK YOU, YOUR HONOR.

I WILL BE VERY BRIEF BECAUSE I BELIEVE I HAVE REITERATED OUR POSITION AS TO THESE ISSUES MANY TIMES BEFORE THIS COURT.

AS TO THE CHALLENGES TO THE UNDERLYING

CONVICTIONS, IT CONTINUES TO BE OUR POSITION THAT THE NINTH CIRCUIT COURT OF APPEALS' DECISION IN ISSUING ITS WRIT OF MANDAMUS PRECLUDES THIS COURT FROM ANY FURTHER CONSIDERATION OF CHALLENGES TO THE CONVICTION.

THE COURT: TELL ME AGAIN WHY IS THAT SO.

MR. MOTLEY: BASICALLY, IT IS BECAUSE THE ISSUE PENDING BEFORE THE NINTH CIRCUIT WAS WHETHER BY MISSING THE ONE-YEAR STATUTORY DEADLINE, HE WAS PRECLUDED FROM FILING A PETITION. THAT WAS THE HOLDING OF THE NINTH CIRCUIT. THE NINTH CIRCUIT SAID IT WAS TOO LATE FOR MR. KELLY TO FILE A PETITION CHALLENGING HIS CONVICTIONS.

TO ME, THE LANGUAGE OF THE NINTH CIRCUIT COULD NOT BE CLEARER SO THAT IS THE BASIS FOR OUR ARGUMENT, YOUR HONOR.

AS TO THE ATTEMPTS TO LITIGATE THE COMPETENCY OF MR. KELLY FOR EXECUTION PURPOSES IN THIS COURT, WE DISAGREE AS TO THE APPLICATION OF MARTINEZ-VILLAREAL. IN THAT CASE, THE ISSUE AS TO SANITY FOR EXECUTION PURPOSES WAS TIMELY RAISED IN A PETITION FILED BEFORE THE COURT. THE DISTRICT COURT THEN DISMISSED THAT CLAIM AS NOT BEING RIPE FOR ADJUDICATION AND THE SUPREME COURT SAID UNDER THOSE CIRCUMSTANCES THAT CLAIM COULD LATER BE BROUGHT.

IN THIS PARTICULAR CASE, THERE WAS NO PRESENTATION OF THE SANITY FOR EXECUTION PURPOSES ISSUES BEING RAISED IN A TIMELY FIRST PETITION. AS A RESULT, IT SHOULD NOT BE

PRESENTABLE TO THIS COURT AT THIS TIME.

TO THE EXTENT THAT A FORD CLAIM MAY BE CONSIDERED BY THIS COURT, IT SHOULD BE RESTRICTED TO JUST THAT. IT SHOULD NOT BE A MINUTE EXAMINATION OF THE PROCEDURES IN MARIN COUNTY. IT IS SIMPLY WHETHER OR NOT THE FEDERAL CONSTITUTIONAL REQUIREMENTS AS SET FORTH IN FORD, NAMELY NOTICE AND THE RIGHT TO COUNSEL, THE RIGHT TO PRESENT EVIDENCE, THE RIGHT TO CROSS-EXAMINE WITNESSES, WAS MADE AVAILABLE TO MR. KELLY IN THE MARIN HEARING.

I THINK IT IS CLEAR FROM THE PLEADINGS FILED BY MR. KELLY'S COUNSEL THAT THESE BASIC REQUIREMENTS WERE MET IN THOSE PROCEEDINGS, AND AS SUCH THERE WAS NO PRIMA FACIE CASE THAT HAS BEEN MADE THAT WOULD SUPPORT A FORD HEARING IN THIS COURT AT THIS TIME.

AS TO THE--

THE COURT: IN SPITE OF THE FACT THAT THE ENTIRE PROCESS, AS I UNDERSTAND IT, UNDER THE CALIFORNIA STATUTE CALLS FOR EITHER ACTION OR INACTION OR NO ACTION TAKEN BY THE EXECUTIVE. IF THE WARDEN, FOR EXAMPLE, DETERMINED THAT HE DIDN'T WANT TO TAKE ANY ACTION THAT WOULD BE THE END OF IT. IF THE WARDEN DID, AS HE DID IN THIS CASE, STATE THAT HE WAS NOT SURE, THEREFORE, THE MATTER WENT TO THE MARIN SUPERIOR COURT, IS THAT THEN A CONSTITUTIONAL ACT ACCORDING TO THE LAW AS YOU UNDERSTAND IT?

MR. MOTLEY: YOUR HONOR, IF THE WARDEN HAD REFUSED

TO REFER THE MATTER TO MARIN COUNTY, THEN THE ISSUE WOULD BE PRESENTED BY THE FACTS. IN THIS CASE SINCE THE WARDEN DID PRESENT THE ISSUE IN MARIN COUNTY THEN THAT ISSUE AS TO THE CONSTITUTIONALITY OF THE STATUTE IS NOT AT ISSUE IN THIS COURT AT THIS TIME.

THE COURT: THAT'S YOUR UNDERSTANDING OF THE CASES?

MR. MOTLEY: YES, YOUR HONOR. I THINK IF YOU READ JUSTICE POWELL'S OPINION IN FORD V. WAINWRIGHT, HE IS QUITE CLEAR THAT THERE HAS TO BE -- THE EXECUTIVE BRANCH HAS THE ABILITY TO MAKE A THRESHOLD DETERMINATION AS TO WHETHER OR NOT TO CONDUCT A HEARING. THAT GOES UNCHALLENGED, IN THIS PARTICULAR CASE, THAT THAT WAS DONE. MR. KELLY HAS NO COMPLAINTS ALONG THAT LINE.

THE COURT: IT IS ONLY IF THE WARDEN HAD NOT ACTED; IS THAT RIGHT?

MR. MOTLEY: IN THAT CASE IT COULD BE EXAMINED, AND THEN IT WOULD BE SIMPLY A QUESTION AS TO WHETHER OR NOT KELLY HAD THE OPPORTUNITY TO PRESENT EVIDENCE TO THE WARDEN.

THE COURT: WHAT ABOUT THE DUE PROCESS PROBLEMS BEYOND THAT WITH THE TRIAL ITSELF?

MR. MOTLEY: YOUR HONOR, I DO NOT BELIEVE THAT THOSE RISE TO THE LEVEL OF A FORD CLAIM.

MY UNDERSTANDING UNDER THE DEFERENCE TO THE STATE

COURT PROCEEDINGS THAT THIS COURT HAS LIMITED JURISDICTION IN FEDERAL HABEAS CORPUS MATTERS AT THIS TIME. AND IT IS SIMPLY A QUESTION OF WHETHER THERE IS A CLEAR VIOLATION OF A BINDING UNITED STATES SUPREME COURT AUTHORITY, AND THAT SUPREME COURT AUTHORITY IS FORD V. WAINWRIGHT, AND THAT SETS FORTH MINIMUM DUE PROCESS REQUIREMENTS. AND AS LONG AS THOSE MINIMUM DUE PROCESS REQUIREMENTS HAVE BEEN MET, OUR POSITION IS THAT THE COURT SHOULD NOT EXAMINE THE HEARING FOR TRIAL COURT ERROR AS LONG AS FORD WAS MET.

FINALLY, BRIEFLY, AS TO COUNSEL'S SUGGESTION THIS COURT MAKE CERTAIN FINDINGS OF FACT. IN LISTENING TO THE RECOMMENDATIONS, I SEE THIS AS HISTORIC REVISIONISM. COUNSEL WAS NOT A PARTICIPANT IN ANY OF THESE PROCEEDINGS, AND I CERTAINLY DON'T BELIEVE IT WOULD BE APPROPRIATE FOR THIS COURT TO GO BACK AND TRY TO CREATE A RECORD. I THINK THE RECORD THAT EXISTS IS THE RECORD THAT SHOULD BE REVIEWED.

THE COURT: THAT'S RIGHT. THE RECORD WILL SPEAK FOR ITSELF.

MR. MOTLEY: IF THE COURT HAS ANY FURTHER QUESTIONS.

THE COURT: NO, I HAVE NOTHING FURTHER.

DID YOU WISH TO RESPOND BRIEFLY?

MR. FERMINO: I DO, YOUR HONOR.

THE COURT: VERY WELL.

MR. FERMINO: BRIEFLY, THREE POINTS THAT MR. MOTLEY MADE.

WITH RESPECT TO THE MARTINEZ-VILLAREAL CASE, THE POSITION THAT MR. MOTLEY TAKES WITH RESPECT TO THAT CLAIM IS IMPOSSIBLE.

IF, IN FACT, THE CLAIM HAD TO BE BROUGHT IN A TIMELY FIRST PETITION, THEN THE FACT THAT THE FORD CLAIM CAN ONLY BE BROUGHT ONCE AN EXECUTION DATE IS ISSUED MAKES IT IMPOSSIBLE TO EVER BRING A FORD CLAIM. WE COULD NOT POSSIBLY HAVE KNOWN THE FACTUAL PREDICATE FOR THIS CLAIM UNTIL THE WARDEN DECLARED A DOUBT AS TO MR. KELLY'S SANITY. AND THE NOTION THAT THIS CLAIM NEEDED TO BE BROUGHT IN AN EARLIER PETITION IN ORDER FOR THIS COURT TO ENTERTAIN IT IS JUST ABSURD.

WITH RESPECT TO FORD AND MR. MOTLEY'S FOCUS ON JUSTICE POWELL'S CONCURRENCE IN THAT CASE, IT IS ACTUALLY JUSTICE POWELL'S CONCURRENCE IN THAT CASE THAT SUPPORTS OUR POSITION HERE. JUSTICE POWELL MADE IT VERY CLEAR THAT WHAT THE COURT DIDN'T DO IN FORD WAS SET A STANDARD WITH RESPECT TO SANITY PROCEEDINGS. IT LEFT IT VERY VAGUE. AND OUR POINT HERE IS THAT THIS COURT CAN -- IS FREE IN THAT REGARD TO MAKE A RULING WITH RESPECT TO THE SANITY STANDARD EMPLOYED IN CALIFORNIA. THAT WAS THE WINDOW THAT WAS LEFT OPENED BY JUSTICE POWELL'S CONCURRENCE IN FORD.

THE COURT: BUT I HEAR YOU SUGGESTING THAT THE

COURT SHOULD EXAMINE IT CAREFULLY, AND TAKE ITS TIME TO DO SO, AND MEANWHILE ISSUE A STAY SO IT CAN CAREFULLY MAKE THAT DETERMINATION.

MR. FERMINO: THAT IS CORRECT, YOUR HONOR. I'M CERTAINLY SAYING THAT IS WITH RESPECT TO MONDAY'S EXECUTION DATE. WITH RESPECT TO HOW LONG IT TAKES THE COURT TO PROCEED, IT IS UP TO THIS COURT, BUT, CERTAINLY, IT CANNOT BE DONE BEFORE JUST AFTER THE STROKE OF MIDNIGHT ON MONDAY.

THE COURT: WE DO HAVE ANOTHER EXECUTION DATE IN JULY, I BELIEVE.

MR. FERMINO: THAT IS CORRECT.

THE LAST POINT THAT MR. MOTLEY RAISED IS THAT THE NINTH CIRCUIT OPINION WITH RESPECT TO THE MOST RESENT ORDER FROM THE CIRCUIT ON WHETHER OR NOT THESE CLAIMS ARE PROPERLY BEFORE THIS COURT, THAT IS, THAT THE COURT SAID THAT THIS COURT COULD NOT ENTERTAIN ANY FURTHER PETITIONS FROM MR. KELLY. THAT IS NOT WHAT THAT OPINION SAYS. THERE WERE NO FINDINGS MADE BY THIS COURT WITH RESPECT TO EQUITABLE TOLLING.

IN FACT, DURING ORAL ARGUMENT, JUDGE TASHIMA SPECIFICALLY ASKED MR. MOTLEY WHY -- ASKED HIM QUESTIONS ABOUT THE RECORD AND COMPLAINED THAT THE RECORD WAS SILENT WITH RESPECT TO ISSUES OF EQUITABLE TOLLING.

AND I THINK CONTRARY TO WHAT MR. MOTLEY SAID AND THE COURT'S REPLY, THERE IS A NEED TO DEVELOP A RECORD HERE

ABOUT WHAT COUNSEL REASONABLY BELIEVED THIS COURT'S ORDERS MEANT WHEN IT TOLD COUNSEL NOT TO WORK ON THIS MATTER UNTIL SANITY PROCEEDINGS COMMENCED, UNTIL THERE WAS SOME RESOLUTION OF MR. KELLY'S COMPETENCY.

AND I BELIEVE THAT THIS COURT NEEDS TO MAKE AFFIRMATIVE FINDINGS IN ORDER FOR THE CIRCUIT TO BE ABLE TO RULE ON THE QUESTION OF EQUITABLE TOLLING.

THE COURT: WHY IS IT IMPORTANT TO TRY TO GET INTO THE HEADS OF PRIOR COUNSEL AS TO WHAT THEY THOUGHT THE COURT ORDERED, RATHER THAN JUST HAVING THE RECORD INDICATE WHAT THE COURT ORDERED?

MR. FERMINO: I BELIEVE THAT THE RECORD SPEAKS FOR WHAT THE COURT ORDERED, BUT, AGAIN, IT IS CLEAR THAT THE NINTH CIRCUIT WAS NOT SATISFIED WITH WHAT WAS ON THE RECORD AND REQUIRED REALLY SOME EXPLANATION OF WHAT THIS COURT MEANT WHEN IT ASKED COUNSEL TO REFRAIN FROM WORKING ON THE CASE, AND THAT IS: WHAT WAS THE AGREEMENT BETWEEN THE PARTIES, RESPONDENT AND COUNSEL FOR MR. KELLY AND THIS COURT, WHEN THE STAYS WERE LIFTED SO THAT PROCEEDINGS COULD COMMENCE IN MARIN COUNTY OR OTHER PROCEEDINGS WITH RESPECT TO MR. KELLY'S COMPETENCY?

SO I THINK IT IS IMPORTANT FOR THIS COURT TO BE SPECIFIC ABOUT ITS RULING.

THE COURT: THANK YOU.

I STILL TEND TO BELIEVE THAT THE ATTORNEY GENERAL

IS CORRECT THAT WE SHOULD NOT GO BACK AND ATTEMPT TO RESURRECT RATHER THAN TO REVISIT WHAT ACTUALLY OCCURRED. AND WHAT ACTUALLY OCCURRED WAS THAT THIS COURT INDEED ORDERED A STAY OF ALL THE PROCEEDING OTHER THAN THE ISSUE OF THE PETITIONER'S SANITY.

REASONABLY, IT COULD NOT BE EXPECTED THAT COUNSEL WOULD GO FORWARD. AS CRITICAL AS THIS COURT HAS BEEN OF PRIOR COUNSEL IN SOME INSTANCES, IT WOULD BE UNFAIR TO THEM TO RULE OTHER THAN I INTEND TO RULE HERE TODAY.

AND IT ISN'T JUST THE COUNSEL THAT I'M CONCERNED WITH, BUT THE FAIRNESS, OF COURSE, GOES DIRECTLY TO THEIR CLIENT. THEIR CLIENT WOULD BE ADVERSELY AFFECTED IF, INDEED, BECAUSE COUNSEL, FOLLOWING THE COURT'S ORDER, THE ORDER, AS I SAY, WAS THAT IT WOULD BE A STAY OF ALL PROCEEDINGS OTHER THAN THE ISSUES OF PETITIONER'S SANITY, AND THAT IS WHAT OCCURRED.

AND SINCE THAT IS WHAT OCCURRED, I'M GOING TO GRANT THE MOTION FOR EQUITABLE TOLLING.

AND I'M FURTHER GOING TO ORDER THAT THE EX PARTE APPLICATION TO SHORTEN TIME FOR MOTION FOR LEAVE TO FILE AN AMENDED PETITION BE GRANTED, AND FURTHER GRANT THE FILING OF THAT PETITION.

AND FURTHER, I'M GOING TO GRANT THE MOTION TO STAY THE PETITIONER'S EXECUTION. AND IT WILL BE STAYED UNTIL FINAL RESOLUTION OF HIS PETITIONS.

ANYTHING FURTHER HERE TODAY?

MR. FERMINO: NOT FROM US, YOUR HONOR.

THE COURT: ALL RIGHT. MR. MOTLEY?

MR. MOTLEY: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU.

MR. FERMINO: THANK YOU.

(PROCEEDINGS ADJOURNED.)

* * * *

I, MARY TUCKER, CSR, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS TRUE AND CORRECT

Mary Tucker 6/4/98

MARY TUCKER, CSR DATE

APPENDIX 2

PACER session date: Wednes February 11, 1998 01:17:
Case docket was last updat on: 02/06/98.

Docket as of February 6, 1998 6:38 pm Page 1

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REOPEN

U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 92-CV-5420

Kelly v. Vasquez Filed: 09/08/92
Assigned to: Judge Terry J. Hatter
Demand: $0,000 Nature of Suit: 535
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition: Writ of H/C - State

HORACE EDWARD KELLY
petitioner

Eugene R Grace
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Karen S Schryver
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Albert De Blanc, Jr
[COR LD NTC]
De Blanc De Blanc & Associates
1875 Century Pk E
6th Floor
Los Angeles, CA 90067
310-282-7550

v.

DANIEL NMI VASQUEZ, as Warden
of San Quentin State Prison
respondent

Proceedings include all events. REOPEN
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?/8/92	1	REQUEST by petitioner Horace Edward Kelly for appt of cnsl & for stay of exec. (mco) [Entry date 01/24/94]
1/15/93	9	ORDER by Judge Terry J. Hatter granting request for appt of cnsl - Crt appts Albert De Blanc, Jr as cnsl for ptr. [1-1] (mco) [Entry date 01/24/94]
6/25/93	12	NOTICE by petitioner Horace Edward Kelly of Related Case - CV 93-2951 WMB (mco) [Entry date 01/24/94]
9/16/93	15	ORDER by Judge Terry J. Hatter appt 2nd cnsl for ptr - Crt appts Eugene R. Grace as 2nd cnsl for ptr. (mco) [Entry date 01/24/94]
10/12/93	17	ORDER by Judge Terry J. Hatter staying execution date of petitioner Horace Edward Kelly till 3/9/94 (mco) [Entry date 01/24/94]
1/3/94	--	FOR ALL PREVIOUS DOCKETING, REFER TO THE PAPER DOCKET (mco) [Entry date 01/24/94]
1/21/94	18	ORDER by Judge Terry J. Hatter that given ltd funds available, the amt of cnsl's req & the fact that cnsl hs yet to file a brief, plf's cnsl shall file a more detailed decl re work performed in this mttr. (mco) [Entry date 02/02/94]
1/31/94	19	EXPARTE APPLICATION by petitioner Horace Edward Kelly for Funds to Retain an Expert. (DOC UNDER SEAL) (mco) [Entry date 02/15/94]
3/7/94	20	ORDER by Judge Terry J. Hatter th ecrt finds that the req amnt are not reasonable & thus w/not be approv. In short, this case has been over-staffed & the crt overcharged.(see fi) The crt w/not entertain CJA vouchers for wk performed by anyone other than those specifically appt by the crt, & then only if reasonable. (yc) [Entry date 03/09/94]
3/9/94	21	APPLICATION by petitioner Horace Edward Kelly for Stay of Exec to Permit Pre of h/c pet. (mco) [Entry date 03/11/94] [Edit date 03/11/94]
3/9/94	--	LODGED/PROPOSED Order re appl for stay of exec. (mco) [Entry date 03/11/94]
3/9/94	22	ORDER by Judge Terry J. Hatter granting application for ext of stay of exec.[21-1] Execution date of petitioner Horace Edward Kelly ;has been ext to 7/7/94 (mco) [Entry date 03/11/94]
6/1/94	23	ORDER by Judge Terry J. Hatter that cnsl shall not fi additiona interim CJA vouchers until the writ of H/C has been fi w/the crt. (yc) [Entry date 06/07/94]

Proceedings include all events. REOPEN
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6/1/94	24	THIRD APPLICATION by petitioner Horace Edward Kelly, for attys fees. (yc) [Entry date 06/07/94]
6/1/94	25	DECLARATION of Eugene R. Grace by petitioner Horace Edward Kelly, in ksuppt of amd first appl fr attys fees filed. **********UNDER SEAL********** (yc) [Entry date 06/14/94]
7/29/94	26	APPLICATION for stay of execution to permit prep of H/C ptn; specification of District Rule by petitioner Horace Edward Kelly (kr) [Entry date 08/02/94]
7/29/94	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 08/02/94]
9/8/94	27	MINUTES: ; mandatory status conference set on 10:00 9/16/94 by Judge Terry J. Hatter CR: na (yc) [Entry date 09/12/94]
9/16/94	28	MINUTES: by Judge Terry J. Hatter CR: Maria Beesley Cnsl to meet fol deadlines: Appl for appt of add l experts by 1/18/95, cmplet investigatin by 1/18/95, filing of ptn by 3/17/95, (yc) [Entry date 09/19/94]
11/29/94	29	ORDER by Judge Terry J. Hatter ; status hearing set on 10:00 12/12/94 (yc) [Entry date 12/05/94]
12/6/94	31	MINUTES: ; status hearing set on 10:00 12/19/94 by Judge Terry J. Hatter CR: na (yc) [Entry date 12/12/94]
12/8/94	30	ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edward Kelly ; set for 3/17/95 (kr) [Entry date 12/12/94]
12/19/94	32	MINUTES: crt ord all proc(S) stayed until fur ord of this crt ; status hearing held by Judge Terry J. Hatter CR: maria beesley (kr) [Entry date 01/17/95]
1/9/95	33	ORDER by Judge Terry J. Hatter, That Dr David Kessle MD be and hereby is appt to conduct a mental evaluation of the ptner of determine the fol. (see fi) That all other aspects of this case be and hereby are STAYED a final determination by this crt of the ptner mental capacity to proceed. (yc) [Entry date 02/18/95]
3/2/95	34	MOTION by petitioner Horace Edward Kelly for order to provide certain records, docs and materials t the crt apptnd competency examiner (9) individual mot for ord see file ; motion hearing set for 10:00 4/3/95 (kr) [Entry date 03/06/95]
3/2/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 03/06/95]

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3/8/95	35	REQUEST by petitioner Horace Edward Kelly for vacatur of current hab corp ptn filing date and resetting of filing date to 7/14/95 (kr) [Entry date 03/10/95]
3/13/95	36	ORDER by Judge Terry J. Hatter ; IN COURT HEARING RE: Habeas copus ptn set on 7/14/95 (yc) [Entry date 03/15/95]
3/14/95	37	ORDER by Judge Terry J. Hatter, tht ptner's cnsl may provide any records, docs and material cnsl deems appropriate to Dr. David Kessler. That respondent shall rept to pnter cnsl contacts respondent or his agents hv w/ptner which relate to ptners competency. That Dr. Kessler may if he choses contract Dr. George Woods prior to Dr Kessler Exam of ptner. That Dr Woods may transmit to Dr Kessler any rpts or records that Dr. Woods believes may be helpful to Dr. Kessler, That ptner may fi any mots that his cnsl deems appropriate. That the mot be and hereby is DENIED as to all other req. (yc) [Entry date 03/16/95]
4/3/95	39	MINUTES: by Judge Terry J. Hatter CR: Maria Beesley mpot to stay procdgs pending cometency exam granted. (yc) [Entry date 04/10/95]
4/7/95	38	Ex parte APPLICATION for expert wit(S) fees for Dr. George Wood, JR. MD, decl of Eugene R. Grace; memo of p/a by petitioner Horace Edward Kelly (kr) [Entry date 04/10/95]
4/7/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 04/10/95]
5/24/95	40	MINUTES: setting hearing on motion for order to provide certain records, docs and materials t the crt apptnd competency examiner (9) individual mot for ord see file [34-1] 10:00 6/12/95 by Judge Terry J. Hatter CR: na (yc) [Entry date 06/06/95]
6/12/95	41	MINUTES: by Judge Terry J. Hatter, Matter cont to 7/17/95 at 10am. CR: Maria Beesley (yc) [Entry date 06/14/95]
6/26/95	42	position re dr. kessler's rpt (kr) [Entry date 06/29/95]
7/5/95	43	RESPONSE by petitioner Horace Edward Kelly to respondents position brief regarding Dr. Kessler rpt. (yc) [Entry date 07/11/95]
7/17/95	44	MINUTES: by Judge Terry J. Hatter, Crt hears frm cnsl. ptner to select a next friend w/in 45 days after which crt w/set a coompetency hrging. CR: Maria Beesley (yc) [Entry date 07/24/95]
8/25/95	45	Ex parte APPLICATION for ord ext time to designate next friend for ptnr by petitioner Horace Edward Kelly (kr) [Entry date 09/05/95]

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8/25/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 09/05/95]
9/5/95	47	ORDER .by Judge Terry J. Hatter, The time for petner to designate a next friend shall be ext for 90 days to 10/16/95. (yc) [Entry date 10/13/95]
10/11/95	46	Ex parte APPLICATION for ord ext time to designate next friend for ptnr; decl of Eugene R. Grace by petitioner Horace Edward Kelly (kr) [Entry date 10/12/95]
10/11/95	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 10/12/95]
10/13/95	48	DECLARATION of Kurt A. Schlitcher in supt of ex parte appl for ord ext time to designate next friend for ptnr by petitioner Horace Edward Kelly (kr) [Entry date 10/14/95]
10/18/95	49	ORDER ext time to designate the next friend for 91 days by Judge Terry J. Hatter (kr) [Entry date 11/03/95]
10/18/95	50	AMENDMENT by petitioner Horace Edward Kelly to [49-1] (kr) [Entry date 11/03/95]
1/5/96	51	ORDER apptng Phyllis Kelly ptnr Horace Kelly's next friend by Judge Terry J. Hatter (kr) [Entry date 01/08/96]
1/10/96	53	MINUTES: ORD that this matter is ref to Mag Judge Virginia Phillips, as successor to Mag Brown's cases, for settlement purposes by Judge Terry J. Hatter CR: none (pbap) [Entry date 01/17/96]
1/11/96	52	PROOF OF SERVICE by petitioner Horace Edward Kelly of svng conformed order appointing Phyllis Kelly petitioner Horace Kelly's next friend to Arthur Calderon, Warden, Calif. State Prison, San Quentin; Clerk of The Court Riverside County Courthouse; Grover Trask, II, district Atty's Office; Sandra Goldsmith, Deputy State Public Defender; Albert De Blanc, Esq.; Karen Schryver, Calif Appellate Project; Gary W. Schons; Horace Edward Kelly; Mary Jameson, California Supreme Court by mail on 1/10/96. (pbap) [Entry date 01/17/96]
1/30/96	54	NOTICE OF MOTION AND MOTION by respondent Daniel NMI Vasquez to amend crt ord apptn next friend ; motion hearing set for 2/26/96 (ti tkn under subm) (jc) [Entry date 02/06/96]
1/30/96	55	MTN to amd ord apptng Plyllis Kelly petr Horace Edwards Kelly's next frind by respondent Daniel NMI Vasquez (jc) [Entry date 02/06/96]

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2/20/96	56	Withdrawal of Notice of Motion to Amend Court order appointing next friend by respondent. (pbap) [Entry date 02/28/96]
3/11/96	57	NOTICE OF MOTION AND MOTION by respondent Daniel NMI Vasquez to amend Court order appointing next friend ; motion hearing set for 4/8/96 (pbap) [Entry date 03/15/96]
3/11/96	--	LODGED/PROPOSED Order (FWD TO CRD) (pbap) [Entry date 03/15/96]
3/11/96	58	MOTION by respondent Daniel NMI Vasquez to amend order appointing Phillis Kelly petner Horace Edward Kelly's next friend ; motion hearing set for 4/8/96 (pbap) [Entry date 03/15/96]
3/22/96	59	OPPOSITION to respondent's by petitioner Horace Edward Kelly to motion to amend Court order appointing next friend [57-1] (es) [Entry date 03/26/96]
3/22/96	60	Declr of Eugene R. Grace in supprt of petitioner's to respondent's opposition by petitioner Horace Edward Kelly to motion to amend Court order appointing next friend [57-1] (es) [Entry date 03/26/96]
3/28/96	61	REPLY by respondent Arthur Calderon (pbap) [Entry date 04/05/96]
3/28/96	62	DECLARATION of Michelle a. Des Jardins by respondent Arthur Calderon, Warden (pbap) [Entry date 04/05/96]
4/8/96	63	MINUTES: setting hearing on motion to amend Court order appointing next friend [57-1] 10:00 4/15/96 by Judge Terry J. Hatter CR: Maria Beesley (pbap) [Entry date 04/19/96]
4/29/96	64	AMENDED ORDER by Judge Terry J. Hatter appointing Phyllis Kelly petner Horace Edwards Kelly's next friend. (pbap) [Entry date 05/28/96]
5/10/96	65	EXPARTE APPLI by petitioner to vacate ord requiring filing of h/c pet prior to filing appli for pymt of fees (mco) [Entry date 05/29/96]
5/10/96	--	LODGED order submitted by petitioner (FWD TO CRD) (mco) [Entry date 05/29/96]
6/11/96	67	Next friend's ex parte APPLICATION for a msc (kr) [Entry date 06/17/96]
6/12/96	66	ORDER by Judge Terry J. Hatter ; man settlement conference 3:00 7/22/96 (kr) [Entry date 06/17/96]

Proceedings include all events. REOPEN
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6/18/96	68	NOTICE by cnsl for petitioner Horace Edward Kelly of change of address (kr) [Entry date 06/19/96]
7/22/96	69	MINUTES: ; settlement conference held; Status conf held "in camera" in crt with Pltfs cnsl presnet only re ex parte appl for fees and costs. Cnsl waive their fees and proceed pro bono and will submit voucher for paralegal's fes and costs. by Judge Terry J. Hatter CR: Maria Beesley (pbap) [Entry date 07/25/96]
10/31/96	70	APPLICATION for stay of execution by petitioner Horace Edward Kelly (kr) [Entry date 11/01/96]
10/31/96	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 11/01/96]
10/31/96	71	ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edward Kelly ; set for <stayin exec until fur ord of this crt> (kr) [Entry date 11/21/96]
11/14/96	72	APPLICATION for expedited stat conf and case mgmt ord; decl of Eugene R. Grace by petitioner Horace Edward Kelly (kr) [Entry date 11/21/96]
11/14/96	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 11/21/96]
12/10/96	73	ORDER by Judge Terry J. Hatter granting application [72-1] ; status conf set on 10:00 12/16/96 (pbap) [Entry date 12/12/96]
12/16/96	74	MINUTES: ; status hearing held ; status hearing contd to 10:00 1/27/97 re competency of petner . Cnsl's req for app't of add'l cnsl denied. cnsl may hire a paralegal at $50 an hour by Judge Terry J. Hatter CR: Maria Beesley (pbap) [Entry date 12/18/96]
1/21/97	75	NOTICE by petitioner of ruling & of status conf (dmjr) [Entry date 02/03/97]
2/3/97	76	MINUTES: hrg on status of ptnr's mental health & whether 1-yr rule applies to ptnr; State's opinion is that 1-yr rule is effective as of the date of filing of pet; Crt determines that Ptnr sh file pet for sanity hrg w/in 30 days. by Judge Terry J. Hatter CR: Maria Beesley (el) [Entry date 02/06/97]
3/17/97	78	NOTICE OF DISCREPANCY AND ORDER by Judge Terry J. Hatter that the ntc of motn to avoid 28 USC 254 petn filing deadline rcvd on 3/14/97 is rejected and returned to cnsl (yt) [Entry date 03/26/97]

Proceedings include all events. REOPEN
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3/17/97	79	CERTIFICATE OF SERVICE by mail of ntc of motn to avoid 28 USC 254 petn filing deadline, etc by petitioner Horace Edward Kelly (yt) [Entry date 03/26/97]
3/20/97	77	NOTICE OF MOTION AND MOTION by petitioner Horace Edward Kelly to avoid 28 USC 254 petn filing deadline; for determination fo the app;ocability of the 1996 revisions to section 2254; for an order granting a sanity hrg re petrs ability to assist cnsl and for an indefinite stay of execution until petr can assist cnsl ; motion hearing set for 10:00 4/14/97 (yt) [Entry date 03/26/97]
3/20/97	--	LODGED/PROPOSED Order (FWD TO CRD) (yt) [Entry date 03/26/97]
3/28/97	80	OPPOSITION by respondent Daniel NMI Vasquez to motion to avoid 28 USC 254 petn filing deadline; for determination fo the app;ocability of the 1996 revisions to section 2254; for an order granting a sanity hrg re petrs ability to assist cnsl and for an indefinite stay of execution until petr can assist cnsl [77-1] (yt) [Entry date 04/02/97]
4/10/97	81	REPLY by petitioner Horace Edward Kelly to res' opp to mot [80-1] (el) [Entry date 04/14/97]
4/16/97	82	NOTICE by petitioner Horace Edward Kelly of change of address (tw) [Entry date 04/29/97]
4/21/97	83	SUPPL BRIEF FILED re motn to avoid the 28 USC 254 petn filing deadline by petitioner Horace Edward Kelly (yt) [Entry date 05/07/97]
5/2/97	84	NOTICE OF MOTION AND MOTION by respondent Daniel NMI Vasquez to dismiss the proceedings and vacate the stay of execution ; motion hearing set for 10:00 6/2/97 (yt) [Entry date 05/19/97]
5/23/97	85	OPPOSITION by petitioner Horace Edward Kelly to motion to dismiss the proceedings and vacate the stay of execution [84-1] (es) [Entry date 06/02/97]
6/17/97	86	ORDER by Judge Terry J. Hatter denying res' motion to dismiss the proceedings and vacate the stay of execution [84-1]; fur Ord thr the fi ddlns of the antiterrorism & Effective Death Penalty Act of 1996 do not apply to this case; fur Ord that ptnr's mtn for a sanity hrg sh be deemed a mtn for a competency hrg; fur Ord that ptnr's mtn for competency hrg is GRANTED; fur ORD that the competency hrg sh be held at 9:30 a.m. on 10/10/97 at San Quentin State Prison; fur Ord that Dr David Kessler sh appr at the competency hrg as the Crt's expert (el) [Entry date 06/18/97]

Proceedings include all events. REOPEN
2:92cv5420 Kelly v. Vasquez

7/2/97	87	MINUTES: Order re monthly CJA interim voucherspur to GO No. 97-2 (see doc for details) by Judge Terry J. Hatter CR: n/a (el) [Entry date 07/08/97]
7/24/97	--	CLERK'S record on appeal transmitted to Circuit vols: 3 (fvap)
8/6/97	88	MOTION by petitioner Horace Edward Kelly to amend the crt's ord of 6-17-97; request for expedited consideration; memo of P/A (et) [Entry date 08/08/97]
8/14/97	89	OPPOSITION by respondent Daniel NMI Vasquez to motion to amend the crt's ord of 6-17-97 [88-1] (et) [Entry date 08/15/97]
8/22/97	90	REPLY by petitioner Horace Edward Kelly re opposition to mot to amend the crt's ord of 6-17-97 [89-1] (et) [Entry date 08/25/97]
8/26/97	91	ORDER by Judge Terry J. Hatter that ptnr's motion to amend the crt's ord of 6-17-97 [88-1] is DENIED, w/ leave to renew after the Ninth Circuit has ruled on res' pending petn for a writ of mandate. (el) [Entry date 09/04/97]
8/28/97	93	9th Cir CA of Appellate Court Order: The case is sched for oral argument in Pasadena, CA, on Friday, 9/5/97, at 11:00 a.m. Argument shall be limited to twenty minutes per side. (weap) [Entry date 09/11/97]
9/4/97	92	APPLICATION for payment of fees for preparation for 10-10-97 competency hrg; declr of Eugene R. Grace by petitioner Horace Edward Kelly (et) [Entry date 09/09/97]
9/18/97	94	ORDER by Judge Terry J. Hatter that applic is granted. Ord that petnr is authorized to spend up to $4,725.00 to have Dr Woods to prepare for & testify at the competency hrg. Ord petnr is authorized to spend up to $1,775.00 to locate & interview Dr Armstrong in preparation for the competency hrg (dmjr) [Entry date 09/22/97]
9/22/97	95	ORDER by Judge Terry J. Hatter tht, peding this Crt's receipt of the 9th Circuit writ of mandate, this case be, & hereby is , CASE STAYED (et) [Entry date 09/29/97]
9/30/97	96	CC 9th Cir CA of Appellate Court Order: The crt has granted the petition for writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the crt filed on 9/18/97. (weap) [Entry date 10/03/97]
10/1/97	99	CERTIFIED COPY of Appellate Court Order: the crt has granted the ptn for Writ of Mandamus fld by petr. Now, therefore, you are directed to take such actions as is consistent with the Opinion of the crt fld on 9/18/97. (ghap)

Proceedings include all events. REOPEN
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[Entry date 10/14/97]

10/7/97 97 CERTIFIED COPY of judgment from USCA, Crt has granted the petition for writ of mandamus fld by petitioner. Now, therefore, your are directed to take such actns as is consistent with the Opinion of the Crt fld on 9-18-97. [ENTERED 10-8-97] (cc: all counsel) (et) [Entry date 10/08/97]

10/7/97 98 ORDER by Judge Terry J. Hatter tht the mandate of the 9th CCA be, & hereby is, fld & spread on the records of this Crt. It is further ORD tht, pur to the 9th Circuit's mandate, the stays of execution be, & hereby are, Lifted. It is further ORD tht, purs to the 9th Circuit's mandate, these cases be, & hereby are, Dismissed. [ENTERED 10-08-97] Mld all cpys w/notc. MD JS-6 terminating case (et) [Entry date 10/08/97]

11/4/97 100 MINUTES: that the order of the 9th CCA filed on 10/27/97 shll be fld and spread upon the records of the court. pur to the order of the US court of appels that the order entered on 10/8/97 dism the actions and lifting the stay of execution is hereby vacated. ORD that the ececution of the deeft is stayed until fur order of the court Case reopened by Judge Terry J. Hatter CR: na (ENT 11/5/97) (yt) [Entry date 11/05/97]

11/4/97 101 COPY of Appellate Court Order: reinstating (yt) [Entry date 11/05/97]

11/4/97 102 CERTIFIED COPY of Appellate Court Order: In accordance w/writ of mandate issued by th court pursuant to its opinion of 9/18/97, dist crt lifted stays of execution & dism cases CV 92-5420 TJH & CV 93-2951 TJH on 10/7/97. In ord to preserve Kelly's rights in interim, it is now ord notwithstanding writ issued on 9/25/97, dist crt shall w/draw its ord of 10/7/97 & until further ord of th court shall reinstate cases & stays of execution, but take no further action re those cases. (pjap) [Entry date 11/13/97]

2/2/98 103 RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 12/12/96;2/3/97;6/12/95;7/17/95;9/16/94;4/3/95 (Re:) CR: Maria Beesley (ghap) [Entry date 02/04/98]

2/2/98 104 TRANSCRIPT filed for proceedings held on 12/12/96 (ghap) [Entry date 02/04/98]

2/2/98 105 TRANSCRIPT filed for proceedings held on 2/3/97 (ghap) [Entry date 02/04/98]

2/2/98 106 TRANSCRIPT filed for proceedings held on 6/12/95 (ghap) [Entry date 02/04/98]

2/2/98 107 TRANSCRIPT filed for proceedings held on 07/17/95 (ghap)

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[Entry date 02/04/98]

2/2/98 108 TRANSCRIPT filed for proceedings held on 9/16/94 (ghap)
[Entry date 02/04/98]

2/2/98 109 TRANSCRIPT filed for proceedings held on 04/03/95 (ghap)
[Entry date 02/04/98]

2/2/98 110 ORDER that pur to the 9th CCA mandate the stays of execution be and are lifted...ord that the case be dism by Judge Terry J. Hatter (ENT 2/6/98) mld cpys & ntc (yt)
[Entry date 02/06/98]

[END OF DOCKET: 2:92cv5420]

PACER session date: Wedne[illegible] February[illegible]
Case docket was last updat[illegible] on: 02/06/98.

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Proceedings include all events. REOPEN
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REOPEN

U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 93-CV-2951

Kelly v. Vasquez, et al Filed: 05/21/93
Assigned to: Judge Terry J. Hatter
Demand: $0,000 Nature of Suit: 535
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

HORACE EDWARDS KELLY
petitioner

Eugene R Grace
[COR LD NTC]
Grace Genson Cosgrove & Schirm
444 S Flower St
11th Floor
Los Angeles, CA 90071
213-487-6660

Karen S Schryver
FAX 415-495-5616
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California Appellate Project
One Ecker Pl
Suite 400
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415-495-0500

Albert De Blanc, Jr
[COR LD NTC]
De Blanc De Blanc & Associates
1875 Century Pk E
6th Floor
Los Angeles, CA 90067
310-282-7550

v.

ARTHUR OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, Warden
respondent

Keith I Motley
619-237-7873
[COR LD NTC]
CAAG Office of Attorney General of California
P O Box 85266
110 West A St
Suite 1100
San Diego, CA 92186-5266

Proceedings include all events. REOPEN
2:93cv2951 Kelly v. Vasquez, et al

619-645-2001

Proceedings include all events. REOPEN
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5/21/93	1	REQUEST by petitioner Horace Edwards Kelly for APPOINTMET OF CNSL IN CA DEATH SENTENCE CASE & STAY OF EXECUTION OF DEATH SENTENCE (am) [Entry date 05/24/93]
5/21/93	2	DECLARATION of Karen S. Schryver in Suppt of Request for Appoint of Cnsl in CA Death Sentence Case & for Stay of Exec [1-1] (mco) [Entry date 06/10/93] [Edit date 06/10/93]
5/25/93	3	NOTICE by petitioner Horace Edwards Kelly of related case(s) CV92-5420 TJH. (es) [Entry date 06/03/93] [Edit date 06/10/93]
6/3/93	4	ORDER RE TRANSFER PUR TO G.O. 224 (Related Case) by Judge Wm. M. Byrne Case reassigned to Judge Terry J. Hatter for all further proceedings(L/N CV92-5420 TJH) (cc: all counsel) (es) [Edit date 07/01/93]
6/4/93	5	ORDER by Judge Terry J. Hatter - It is ord that Albert De Blanc Jr who is cnsl for the petr in the companion case CV 92-5420 TJH is hereby appointed cnsl for the petr in this instanct act. (cc: all counsel) (mco) [Entry date 06/08/93] [Edit date 06/10/93]
6/4/93	6	ORDER Staying Execution - It is ord by Judge Terry J. Hatter that the execution date of petitioner Horace Edwards Kelly set for 7/9/93 be stayed for a period of 45 days to & including 8/23/93 (cc: counsel) (mco) [Entry date 06/08/93] [Edit date 06/10/93]
8/16/93	7	ORDER by Judge Terry J. Hatter that mot to appt 2nd cnsl is granted. It is further ord that Eugene R. Grace of Grace, Skocypec, Cosgrove & Schirm be & hereby is apptd as 2nd cnsl. [3-2] (mco) [Entry date 10/05/93]
9/16/93	8	APPLICATION by petitioner Horace Edwards Kelly for Ord to Appt 2nd Cnsl - Under Seal Doc - (mco) [Entry date 10/08/93]
9/16/93	9	ORDER by Judge Terry J. Hatter Apptn 2nd Cnsl; Recomm of Cnsl -Under Seal Doc-(cc: all counsel) (mco) [Entry date 10/08/93]
11/10/93	10	APPLICATION by petitioner Horace Edwards Kelly for Stay of Exec to Permit Prep of H/C pet. (mco) [Entry date 11/16/93]
11/10/93	--	LODGED order submitted by petitioner Horace Edwards Kelly (mco) [Entry date 11/16/93]
11/12/93	11	ORDER by Judge Terry J. Hatter granting document proposed ord ext stay of exec to & including 3-9-93. (mco) [Entry date 11/16/93]
4/4/94	12	NOTICE by respondent Arthur Calderon to change of address. (mco) [Entry date 04/06/94]

Proceedings include all events. REOPEN
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6/1/94	13	ORDER that the court has approved the amended interim CJA vouchers...it is ORD tht cnsl shall not fiel addtl interim CJA vouchers until the writ of H/C has been fld with the court by Judge Terry J. Hatter (yt) [Entry date 06/10/94]
8/1/94	14	ORDER by Judge Consuelo B. Marshall execution stayed until date of petitioner Horace Edwards Kelly ; set for 11/4/94 (kr) [Entry date 08/02/94]
9/8/94	15	MINUTES: ; mandatory status conference set on 10:00 9/16/94 by Judge Terry J. Hatter CR: NA (yt) [Entry date 09/20/94]
9/16/94	16	MINUTES: mandatory status conference held; applic for appt of addl experts due 1/18/95; complete investigation by 1/18/95; filing of petn by 3/17/95 by Judge Terry J. Hatter CR: Maria Beesley (yt) [Entry date 09/20/94]
11/29/94	19	ORDER stat conf re the mental competency of the ptnrs is set for 12/12/94 at 10:00 am by Judge Terry J. Hatter (kr) [Entry date 01/10/95]
12/6/94	20	MINUTES: stat conf re mental comptency of plfs is resched to 12/19/94 at 10:00 am by Judge Terry J. Hatter CR: none (kr) [Entry date 01/10/95]
12/8/94	17	APPLICATION for stay of execution to permit prep of hab corp ptn; specification of iss.. by petitioner Horace Edwards Kelly (kr) [Entry date 12/09/94]
12/8/94	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 12/09/94]
12/8/94	18	APPLICATION for stay of execution to permit prep of hab corp ptn; specification of iss. by petitioner Horace Edwards Kelly (kr) [Entry date 12/09/94]
12/8/94	--	LODGED/PROPOSED Order (FWD TO CRD) (kr) [Entry date 12/09/94]
12/29/94	21	MINUTES: crt ord all proc(s) stayed until fur ords of this crt. by Judge Terry J. Hatter CR: none (kr) [Entry date 01/10/95]
1/9/95	22	ORDER David Kessler is appointed to conduct a mental evaluation of ptnr, by Judge Terry J. Hatter execution date of petitioner Horace Edwards Kelly ; all proc(s) are stayed until a pending final determination of ptrns mental capacity to proceed. <date not set> (kr) [Entry date 02/28/95]
3/14/95	24	ORDER ptnrs cnsl may provide any recs, docs and materials cnsl deems appropriate to Dr. Kessler, et al, mot is DENIED as to all other req. by Judge Terry J. Hatter (kr)

Proceedings include all events. REOPEN
2:93cv2951 Kelly v. Vasquez, et al

[Entry date 03/28/95]

3/16/95 23 opp to mot for orders by respondent Arthur Calderon to (kr) [Entry date 03/17/95]

4/3/95 25 MINUTES: mot to stay proc(s) is pndg comp exam is Gr by Judge Terry J. Hatter CR: maria beesley (kr) [Entry date 04/17/95]

5/24/95 26 MINUTES: ; IN COURT HEARING RE: Dr. Kessler's rpt set on 10:00 6/12/95 by Judge Terry J. Hatter CR: none (kr) [Entry date 06/20/95]

7/17/95 27 MINUTES: Fur hrg re Dr. Kessler's Rep. Petr to select a "next friend' w/in 45 days after which crt will set a competency hrg by Judge Terry J. Hatter CR: Maria Beesley (lori) [Entry date 07/25/95]

9/5/95 28 ORDER ext time to designate next friend; to 10/16/95 by Judge Terry J. Hatter (kr) [Entry date 09/15/95]

4/29/96 29 AMD ORDER by Judge Terry J. Hatter appointing Phyllis Kelly petr Horace Kelly's next friend be amd to read as follows: Phyllis Kelly is appointed as next friend of petr Horace Edwards Kelly; as the next friend of petr Horace Edwards Kelly, Phyllis Kelly is auth to pursue legal actn in the name of petr and to sign any legal doc related thereto. (ab) [Entry date 05/08/96]

7/22/96 30 MINUTES: settlment conf and stat conf hld stat conf hld in camera re ex parte appl for fees and costs; cnsl waive fees and proceed pro bono and will subm voucher for paralegal fees and costs by Judge Terry J. Hatter CR: Maria Beesley (lc) [Entry date 07/25/96]

8/1/96 31 ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edwards Kelly is vacated (kr) [Entry date 08/05/96]

10/31/96 32 ORDER by Judge Terry J. Hatter execution date of petitioner Horace Edwards Kelly ; set for staying exec until fur ord of this crt (kr) [Entry date 11/21/96]

12/10/96 33 ORDER req for an exp stat conf is GR, stat conf is sched for December 16, 1996 at 10am by Judge Terry J. Hatter (kr) [Entry date 12/16/96]

Proceedings include all events. REOPEN
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6/17/97	34	ORDER by Judge Terry J. Hatter that resp's mtn to dism & vacate the stays of exec be and hereby is, DENIED; fur Ord tht the fi ddlns for the Antiterrosism & Effective Death Penalty Act of 1996 do not apply to this case; fur Ord that ptnr's mtn for a sanity hrg sh be deemed a mtn for a competency hrg; fur Ord that ptnr's mtn for competency hrg is Granted; fur Ord that the competency hrg be held at 9:30a.m. 10/10/97 at San Quentin State Prison; fur Ord that Dr David Kessler sh appr at the competency hrg as the Crt's expert. (el) [Entry date 06/18/97] [Edit date 09/04/97]
7/2/97	35	MINUTES: Order re monthly CJA interim vouchers pur to GO No. 97-2 (see doc for details) by Judge Terry J. Hatter CR: n/a (el) [Entry date 07/08/97]
8/26/97	36	ORDER by Judge Terry J. Hatter that the ptnr's mtn to amend the Crt's Order of 7/17/97 is DENIED, w/ leave to renew it after the 9th Circuit has ruled on res' pending petn for a writ of mandate. (el) [Entry date 09/04/97]
9/18/97	37	ORDER by Judge Terry J. Hatter that the applic for funds is granted. Ord that petnr is authorized to spend up to $4,725.00 to have Dr Woods prepare for & testify at the competency hrg. Ord that petnr is authorized to spend up to $1,775.00 to locate & interview Dr Srmstrong in preparation for the competency hrg (dmjr) [Entry date 09/22/97]
9/22/97	38	ORDER by Judge Terry J. Hatter tht, pending this Crt's receipt of the 9th Circuit's writ of mandate, this case be & hereby is , CASE STAYED (et) [Entry date 09/29/97]
9/30/97	39	CC 9th Cir CA of Appellate Court Order: The crt has granted the petition for Writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the crt filed on 9/18/97. (weap) [Entry date 10/03/97]
10/1/97	42	CERTIFIED COPY of Appellate Court Order: the crt has granted the ptn for Writ of Mandamus fld by petr. Now, therefore, you are directed to take such actions as is consistent with the Opinion of the crt fld on 9/18/97. (ghap) [Entry date 10/14/97]
10/7/97	40	CERTIFIED COPY of judgment from USCA the Crt has granted the petn for writ of mandamus filed by petitioner. Now, therefore, your are directed to take such actns as is consistent with the Opinion of the Crt fld on 9-18-97. [ENTERED 10-8-97] (cc: all counsel) (et) [Entry date 10/08/97]

Proceedings include all events. REOPEN
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10/7/97	41	ORDER by Judge Terry J. Hatter tht the mandate of the 9th CCA be, & hereby is, fld & spread on the records on this Crt. It is further ORD tht, purs to the 9th Circuit's mandate, the stays of execution be, & hereby are, lifted. It is further ORD tht, pur to the 9th Circuit's mandate, these cases be, & hereby are, Dismissed. [ENTERED 10-8-97] Mld all cpys w/ntc. MD JS-6. terminating case (et) [Entry date 10/08/97]
11/4/97	43	MINUTES:that the order of the 9th CCA fld on 10/27/97 shll be fld and spread upon the records of the court. ORD tha pur to the ORD of the Court of Appeals entered on 10/8/97 dism the actions and lifting the stay of execution is hereby vacated; ord that the execution of the deft is stayed until fur order of the court; Case reopened by Judge Terry J. Hatter CR: na (ENT 11/5/97) (yt) [Entry date 11/05/97]
11/4/97	44	CERTIFIED COPY of Appellate Court Order: In accordance w/writ of mandate issued by th court pursuant to its opinion of 9/18/97, dist court lifted stays of execution & dismissed cases CV 92-5420 TJH & CV 93-2951 TJH on 10/7/97. In ord to preserve Kelly's rights in interim, it is now ord that notwithstanding writ issued on 9/25/97, dist court shall w/draw its ord of 10/7/97 & until further ord of th court shall reinstate cases & stays of execution, but take no further action regarding those cases. (pjap) [Entry date 11/13/97]
2/2/98	45	ORDER that pur to the 9th CCA mandate the stays of execution be and are lifted...ORD that the case be dism by Judge Terry J. Hatter (ENT 2/6/98) mld cpys & ntc (yt) [Entry date 02/06/98]

[END OF DOCKET: 2:93cv2951]

Wed Feb 11 13:14:55 EST 1998********** END OF CASE 2:93cv02951 **********

APPENDIX 3

DECLARATION OF HARRY SIMON

I, Harry Simon, declare:

1. I am a deputy federal public defender assigned to represent real party interest, Horace Edwards Kelly, in federal habeas proceedings pending before the United States District Court for the Central District of California. All of the facts contained in this declaration are known to me personally and if called as a witness I could and would competently testify thereto.

2. A few weeks ago, our office obtained a tape of the oral argument held before the Court of Appeals on September 5, 1998 in Calderon v. United States District Court (Kelly), Case No. 97-70785. A transcript of that tape was prepared at my direction and is appended to this declaration. I have listened to that tape and reviewed the transcript. The transcript appended to this declaration is a true and accurate reflection of the contents of that tape.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

DATED: June 2, 1998

Harry Simon

CALDERON v. USDC, Kelly

97-70785

Friday, September 5, 1997
11:00 a.m.
Courtroom 1, Pasadena

Judge Fernandez: Good morning ladies and gentleman, we are calling the matter of Calderon v. United States District Court, Kelly. Before we get started I understand there is an intent to have a Mr. Neuhoff present argument . . .

Albert DeBlanc: Yes, Good morning Your Honor, I am attorney Albert De Blanc, Jr. and I'm counsel of record as to Horace Kelly. The reason Richard Neuhoff, Mr. Neuhoff is present is because we engaged him to do the research and to write the brief in response to the Attorney General's request . . .

Judge Fernandez: Well my question is, has he or does he intend to make a formal appearance in this case. If he doesn't intend to appear formally on behalf of your client, then I really fail to see how we can allow him to present the argument . . .

Albert DeBlanc: His intent will be to formally appear, yes Your Honor . . .

Judge Fernandez: So Mr. Neuhoff, you are formally entering an appearance in this case on behalf of Mr. Kelly, is that correct?

Richard Neuhoff: Yes, Your Honor . . .

Judge Fernandez: Well you'll becoming an attorney of record, to put it bluntly correct?,

Albert DeBlanc: Thank you Your Honor . . .

Judge Hall: Is he a member of our bar? . . .

Judge Fernandez: You are a member of our bar correct?

(silence), (unintelligible)

Judge Fernandez: All right, then we will proceed first, I believe, with the Petitioner since this is a

Petition for Writ of Mandate and the person requesting it seems to me that it ought to go first . . .

Albert DeBlanc: Thank you Your Honor.

AG Keith Motley: Thank you Your Honor may I please the court, and Keith Motley, Deputy Attorney General for Petitioner Warden Calderon. I believe the threshold question presented, and I believe the definitive question is whether the trial court's decision below was clearly erroneous and our argument presented to this court has been based primarily on this court's recent decision in Beeler. In the Beeler decision, this court eventually ruled that equitable tolling would apply to the AEDPA. However, before getting to that issue, the court necessarily had to resolve the issue before this Court as to whether or not the filing of a request for counsel instituted proceedings in the district court, which it will be considered the same as the filing of a petition thereby picking this case out of the framework of the Anti-Terrorism legislation. This court in Beeler made a succinct and definite and necessary ruling that this was not so, and that the AEDPA should apply unless a Petition for Writ of Habeas Corpus had been filed in the district court. That was the act which would determine whether the Act would apply or not. We believe that . . .

Judge Fernandez: Are you referring to that footnote in Beeler particularly or . . .

Motley: Yes, Your Honor . . .

Judge Fernandez: All right . . .

Motley: And our position is that it was relegated to a footnote because the answer was so obvious and we believe that under stare decisis and under the rules of this court that the district court was obligated to honor that decision and when . . . it's not . . .

Judge Tashima: What are you saying it's not possible to read the district court's order as honoring that decision? In other words that the Act applies but it's tolled?

Motley: No, Your Honor the order of the district court was very explicit . . .

Judge Tashima: It's very brief . . . I know that.

Motley: Counsel had asked for equitable tolling and the court rejected that request . . .

Judge Tashima: Where does it show it's rejected in the record?

Motley: It does not show it in the record, Your Honor. However, counsel subsequent to the time that I filed my Petition... counsel asked the district court to reconsider its decision and to amend it to include equitable tolling, and subsequently the district court refused that request.

Judge Tashima: Well, it denied it, sort of speak, without prejudice, right?

Motley: Apparently the court below felt that it wasn't necessary to rule on it since the court was finding that the AEDPA did not apply, therefore it was not necessary to reach that issue.

Judge Tashima: Well, no there is another way to read that, you know, the trial court can say well I don't think I should change the order while it's on appeal, one way to look at it, right?

Motley: Your Honor, the court did not say that . . .

Judge Tashima: It didn't say what you said either . . .

Motley: The court explicitly said: the Act does not .

Judge Tashima: What it said on the request for their reconsideration . . .

Motley: Your Honor, I think that all we can deal with is the order that I am petitioning from was the order Wherein the district court said explicitly that the Act does not apply, and as far as I know, the district court below has not filed any responsive pleadings to our Petition for Mandate clarifying that order or explaining that order, or trying to say that the order did not state explicitly what it said.

Judge Fernandez: Well, if assuming for a moment that tolling is possible in this case, and I guess we do have to assume it's possible, to have tolling under this Act, in this case, would the theoretical possibility of tolling under the AEDPA or the actual possibility of tolling under the AEDPA make any difference to the outcome of this case?

Motley: Your Honor . . .

Judge Fernandez: As the record is presented?

Motley: Your Honor, I did not believe the tolling would be appropriate under this case under any circumstances. However, until a request is made for tolling, until the petition is filed with reasons set out as for why tolling would apply to each individual argument, that would be presented in the petition, we can't say as to whether . . . I can't respond to the arguments whether the tolling will be appropriate.

Judge Fernandez: They are suggesting, if I understand you counsel, they are suggesting this thing, this is tolled and it seems to me it's been what's been going on since this case was in the California Courts. This and all proceedings should be tolled because he is not competent. That is your position, Okay? So, suppose you grant hypothetically he is not competent, Kelly you know, Kelly may slaughter all kinds of people, but he is not competent, Okay, he just isn't. So you grant that. Does that make any difference in the facts of this case?

Motley: No, Your Honor. We have consistently argued in the district court below that Mr. Kelly's competency to assist counsel has no relevancy to the issues. Since he does not have any constitutional right to the assistance of counsel below. Therefore, it would necessarily follow that he does not have any constitutional right to be competent to assist counsel.

Judge Tashima: It's not a matter of a constitutional right. It's a matter of statutory interpretation but, if your position is correct, it would apply to Beeler, wouldn't it?

Motley: In what way Your Honor?

Judge Tashima: Well, I mean the reason he was entitled to tolling is because his attorney couldn't help him, but that would not make any difference if he has no right to counsel?

Motley: I don't believe that was the . . .

Judge Tashima: Well, what was the reason for tolling the statute in Beeler?

Motley: Because counsel left and . . .

Judge Tashima: Precisely his counsel was not available to assist him, but what difference does that make if you said he is not entitled to the assistance of counsel ...

Motley: And the tolling was for a definitive period of few months, Your Honor. In this case they are asking, if for anything, its indefinite tolling . . .

Judge Tashima: So, that's the basis to distinguish Beeler that it is for a definitive period . . .

Motley: That's one basis, yes, Your Honor.

Judge Tashima: Was there any other basis?

Motley: To the . . . well, I do not believe that Beeler considered the question as far as the necessity that competency to assist counsel. That issue was not considered at all in Beeler. I don't believe that that case would be of any assistance in resolving the underlying issue in this case. I feel that what we are entitled to is an order directing the district court to honor this Court's ruling in Beeler.

Judge Tashima: This order is so brief, it's hard to tell what the district judge meant. The operative sense is that, orders that the filing deadlines of the AEDPA do not apply. Did not say the Act doesn't apply, it says the filing deadline does not apply. That assumes that the Act applies, right? and only the deadline doesn't apply. If only the deadline doesn't isn't that a ruling that it's tolled?

Motley: No, Your Honor. The only issue before the court that was litigated at that time was whether or not the Act was applicable. The only issue that was argued by the other side to the judge was that the Act did not apply since they have requested counsel. They also requested equitable tolling but the district court below did not feel it necessary.

Judge Tashima: Well, if it is so, do you think that it will be a good case for a limited remand to the district court to find out what they really meant?

Motley: Your Honor, the district court had the opportunity and the request by counsel, to grant equitable tolling as a fall back position, and the court refused to do that.

Judge Tashima: Well, is that in the record here somewhere?

Motley: That has happened subsequent to the time that I filed the Petition Your Honor.

Judge Tashima: Are you talking about the Motion to Amend, right?

Motley: Yes, Your Honor.

Judge Tashima: And we do not know why the district court declined to amend, except, all I have is a docket. The docket says, it's denied with leave to renew after the Ninth Circuit has ruled on the Respondent's pending Petition. Which means, I think, to me that it does not want to interfere with the appellate proceedings.

Judge Fernandez: Suggests to me that the court thinks that the AEDPA does not apply period, and that's why is not going to rule.

Motley: Your Honor, I believe that the respondent has had the opportunity during the pendency of this proceedings to file pleadings on its own behalf to justify its position. If it felt it was being misrepresented by any of the parties and I think it's quite clear, since . . . from our position, that the issue is clear and succinct as to whether or not the Act applies because they requested counsel. That was the position put forth for the

district court, and the district court ruled that the Act didn't apply.

Judge Fernandez: Now, you asked, I believe your writ asked that we order the stay lifted and the cases dismissed, correct?

Motley: Yes, Your Honor.

Judge Fernandez: All right, so it seems to me that the implicit in that request is, at least from your standpoint, and you seem a little bit unsure about it as I am listening to the questions and answers. The thrust of that request is that there can't be equitable tolling, there can't be tolling in this case, on the facts of this case. Is that your position?

Motley: That is our position Your Honor, but I do not believe that is before this court. The relief we are entitled to is to a dismissal at that point in time there is nothing pending before the district court.

Judge Fernandez: Well, suppose we said well the AEDPA does not . . . back up . . . suppose this court said: Judge Hatter is wrong. The AEDPA applies to this case. The AEDPA has a one-year statute of limitations commencing to run on the date it was enacted, so far so good?

Motley: Yes, Your Honor.

Judge Fernandez: Okay, now, but suppose somebody said but wait a minute there ought to be tolling. Is it your position that, it can't be tolling because there is no Petition on file?, and if you all want to argue tolling, file a Petition or an application for habeas corpus. Is that your position?

Motley: Yes, Your Honor.

Judge Tashima: But, wasn't that the status Beeler was in? He had not filed a petition? Are we bound by Beeler in that respect?

Motley: Well, Your Honor, there was equitable tolling granted . . .

Judge Tashima: No, my question is ... just a minute you

didn't hear my question, my question is wasn't the status of Beeler that he had not filed a petition and yet we held that the statute was tolled. Is that true or not?

Motley: What this court did was agreed with the district court's decision to toll the statute prior to the time that the statute ran.

Judge Tashima: Or even before a Petition was filed, right?

Motley: That's true . . .

Judge Tashima: Necessarily it has to be . . .

Motley: But the Judge ruled during the period of time on which the court had jurisdiction over the matter.

Judge Tashima: Necessarily, it has to be before a Petition was filed, right?
Otherwise, you don't have to toll the statute if . . .

Motley: We are not disagreeing with the McFarland or the fact that the court has jurisdiction to issue orders prior to the findings of the Petition. What we are saying is that they have a window of jurisdiction of one year at this point in time. Once you get outside that period of time, as we have here, the trial . . .

Judge Tashima: Isn't that contrary to Beeler?

Motley: No, Your Honor.

Judge Tashima: Beeler said that you have more than one year.

Motley: No, Your Honor.

Judge Tashima: Does it?

Motley: Your Honor, what the judge ruled within the one year to extend the period by using of equitable tolling.

Judge Tashima: And Judge Hatter did not rule within one year?

Motley: That's true.

Judge Tashima: You mean, that the year have past by June 17 of 1997?

Motley: Yes.

Judge Tashima: It's too late to make that ruling after the year have past, is that your position?

Motley: That's our position.

Judge Fernandez: Unless they file a Petition?

Motley: That's true, they can always file a Petition and request equitable tolling. At that point in time, the matter would be considered and then we can respond to it. I think that our arguments would be successful and that it would not be appropriate.

Judge Tashima: By the way, let me ask you, you know, throughout these proceedings every once in a while the Judge seemed to order some kind of a mental exam, I guess it's never been held, is that right? Mental exam by Dr. Kessler?

Motley: Dr. Kessler examined the . . .

Judge Tashima: The petitioner . . .

Motley: . . . several years ago, and the court has the competency hearing pending now in October. However, that is directed towards his competency to assist counsel, and our position has been consistently that this is irrelevant to the proceedings.

Judge Tashima: The hearing is on the issue of whether Kelly is competent to assist counsel, is that . . .

Motley: That's correct.

Judge Tashima: It that the limited purpose of the competency hearing?

Motley: That's correct.

Judge Tashima: Thank you.

Motley: If I could Your Honor, I would like to reserve my remaining time to rebut the arguments made . . .

Judge Fernandez: You may.

Motley: Thank you.

Neuhoff: Thank you Your Honor, may I please the court. I'll start by addressing Beeler, the footnote in Beeler. I want to say four things about the footnote. (1) It's dictum. The court could have . . . would have come up the same way no matter how it decided the issue in the footnote, (2) Beeler decision did not consider any of the points that we have made in our brief to this Court as to what Congress' intent was as to the meaning of "cases pending". I think it is pretty established law that decisions of this court or any court are not authority for propositions not considered, (3) even if you felt yourself in someway, (3) there was a petition for a rehearing pending precisely on the Beeler footnote, and a request for a rehearing en banc, so that is not final language yet, that was pointed out in our brief in a footnote . . . we pointed that out . . .

Judge Fernandez: Well, it's binding on us at this point, is it not?

Neuhoff: I don't believe it's binding on you (a) for that because it is not final and (b) for other reason that since Beeler was handed, the U.S. Supreme Court came down in Lindh and came out with language that is inconsistent with the Beeler footnote...

Judge Fernandez: I think you misunderstand what's binding upon us. Because even when a case has gone en banc, has been taken en banc, the ruling of the panel, we consider binding on other panels in the 9th Circuit until such time as it gets overturned by the en banc court.

Neuhoff: I don't think that would be true of dictum, No. 1; No. 2 is I also believe ...

Judge Fernandez: Well, that dictum is never true of dictum. If the case is final, solid, etc. etc. one can always say its dictum. You don't have to follow it. So that doesn't help as much.

Neuhoff: The second one is ...

Judge Tashima: Is it dictum?

Neuhoff: Yes, sir, Yes, Your Honor.

Judge Tashima: This footnote?

Neuhoff: Yes.

Judge Tashima: You're still talking about the footnote, right?

Neuhoff: Yes.

Judge Tashima: All right. And you also said something about it is inconsistent with Lindh?

Neuhoff: Yes.

Judge Tashima: In what way?

Neuhoff: Because in the end of Lindh and the way I talked about it in the brief, Lindh describes the appointment of counsel under 848(q) which is what we have had in this case as a "pending case" under § 107(c) of the Act which is the precise provision at issue here.

Judge Tashima: Under what section?

Neuhoff: Lindh describes the appointment of counsel under 21 U.S.C. 848(q)4,(b), where they use the word "post conviction proceedings." Lindh says that appointment of counsel is a pending case under . . . makes the case a pending case under the 1996 Act. I only have the Westlaw cite for that. I don't have the official cite. It was in my brief.

Judge Fernandez: What's the Westlaw cite?

Neuhoff: Excuse me?

Judge Fernandez: The Westlaw cite?

Neuhoff: Right.

Judge Fernandez: I want to talk about dicta. Lindh wasn't dealing with that sort of case ...

Neuhoff: Absolutely not, but it described ...

Judge Fernandez: Anyway, what's the cite?

Neuhoff: It's 1997 Westlaw 338658*8.

Judge Tashima: You brief as 338568?

Neuhoff: Did I say something different from that?

Judge Tashima: I thought you said 668.

Neuhoff: I meant to say what my brief says, since I'm ...

Judge Tashima: Star 5.

Neuhoff: Star 8, at this point. I'm at page eight of my brief.

Judge Fernandez: Now you understand that Lindh stated the question before the court was whether the Act governed applications in non-capital cases that were already pending. Applications pending, correct?

Neuhoff: Huh.

Judge Fernandez: That's the issue before the court as the court stated it.

Neuhoff: Right. That's right. That's what is stated in the opening sentence. It used the word application five times in its opinion and it used the word cases pending 58 times.

Judge Fernandez: Correct. Which indicates probably it wasn't exactly focusing on that problem, correct?

Neuhoff: But it wouldn't have ... it couldn't...it was probably not focusing on that problem, huh, but to the same extent that it wasn't focusing on ... it also said in that very same sentence, the court is talking about, that the issue in this case is whether it governs applications in non-capital cases and were obviously going to apply Lindh to this capital case, even though Lindh was an issue ...

Judge Fernandez: Well, of course, we can't use the special non-capital case provisions for reasons that we all understand in California, right?

Judge Fernandez: So, naturally, the non-capital apply to this capital case because this is a non-capital

case as far as the provisions of the Act are concerned, correct?

Neuhoff: No. No, Chapter 154 applies equally to capital and non-capital cases. It doesn't...your talking about Chapter 154 which applies specially to capital cases from certain jurisdictions, right?

Judge Fernandez: Correct.

Neuhoff: Right.

Judge Tashima: Mr. Neuhoff, what about, I assume you have another part of your argument. Suppose, suppose, we don't agree that this is a pending case. In other words, that the AEDPA does apply to this case. Your position then is what?

Neuhoff: Well, at that point, this Court is entitled to and out to, if there is any ground appearing in the record from which the district court's decision and its exercise of discretion can be upheld then the court can deny the writ on that basis and another ground here is equitable tolling.

Judge Tashima: What appears in the record?

Neuhoff: What appears in the record ...

Judge Tashima: To support that?

Neuhoff: Excuse me?

Judge Tashima: What appears in the record to support that?

Neuhoff: What appears in the record is that the district court has before it prima facie evidence, at least, that Mr. Kelly is: (a) incompetent to proceed and assist counsel in his habeas proceedings and (b) is incompetent to be executed. Now if these facts turn out to be true and Mr. Kelly is in fact, incompetent, then (a) he might get equitable tolling on that basis and (b) ...

Judge Fernandez: Why don't we take (a) and (b) separately. (b) is fairly simple, isn't it? (b) You can't bring until a writ of execution issues. We've said that, California said that. If a

writ does issue, you have a California procedure to take care of the problem and you have access to federal courts to take care of the problems. So let's forget (b).

Neuhoff: I'd like to address that at some point, however.

Judge Fernandez: Discuss it now.

Neuhoff: Well number one is, the state has not given in on that one. They are asking for a cert petition on that. So we can't . . . .

Judge Fernandez: It's the law of this circuit at this point.

Neuhoff: But if the U.S. Supreme Court were to decide differently, Mr. Kelly would be hung and strung out there to dry.

Judge Fernandez: Well, if the Supreme Court decided differently, then he would be strung out to dry and that would be the end of that, wouldn't it?

Neuhoff: But we wouldn't want to ...

Judge Fernandez: But were not gonna, it wouldn't even matter if the Supreme Court decided differently, would it? You have a California, a separate California procedure to argue incompetence to be executed once a writ issues, correct?

Judge Fernandez: If you don't know that to be correct, just assume with me for a moment . . . that I'm correct.

Neuhoff: (unt) I will assume that it's correct.

Judge Fernandez: There is a special California procedure that takes care of that problem. Let's guess that for a moment. And if there is then maybe you don't have a problem anyway. In terms of branch (a): that sounds to me like an almost purely legal question. <u>The question that was actually presented to the California Supreme Court at one point is: if a person is incompetent to aid counsel in post-conviction proceedings, should or are the proceedings tolled</u>.

Neuhoff: Okay.

Judge Fernandez: That's a straight legal question. It doesn't even need any facts developed, does it? If we assume he is incompetent.

Neuhoff: If you assume he's incompetent.

Judge Fernandez: Assume he's incompetent. Now you are asking a legal question, are you not?

Neuhoff: Yes.

Judge Fernandez: Okay, so why don't you answer the legal question.

Judge Fernandez: And the answer to that is (giggle)

Neuhoff: Sorry?

Neuhoff: And the answer is?

Judge Fernandez: Yeah!, why don't you answer that legal question.

Neuhoff: Well, the answer is that he has right to be competent through the proceedings to assist his counsel. He may ... that particular issue wasn't brief in any depth before the court, for this Court it was briefed I think to some extent in the district court.

Judge Fernandez: Okay, well, the issues before us would have to be the ones that were before the California Supreme Court on direct appeal, correct?

Neuhoff: Not to, well, the issue before the California Supreme Court was whether he was incompetent to proceed in front of that court at that time.

Judge Fernandez: No, no, we're assuming that he is incompetent. We're all just going to, at least...

Neuhoff: You mean the substantive issues beyond ...

Judge Fernandez: In my present frame of mind, I will assume he is incompetent, Okay?

Judge Fernandez: Let's say he's incompetent. The only issues that can be raised in this habeas corpus are issues that have been disposed of by the

California Supreme Court on a direct appeal, is that correct?

Neuhoff: No.

Judge Fernandez: All right? What other issues?

Neuhoff: Under the McClesky case, we have an obligation to raise all claims, even claims that we were not able to develop in the California Supreme Court.

Judge Fernandez: Those have never been presented to the California courts on post-conviction relief, have they?

Judge Fernandez: (Ergo), they would be what, what do we call them? Unexhausted? Wouldn't they be unexhausted?

Neuhoff: You're putting us into a Catch 22 in that situation, are you not? When you say, we have to raise all claims but we never have an opportunity to do it?

Judge Fernandez: Oh you do. Go to California and raise your unexhausted claims.

Neuhoff: But we can't develop the claims and McClesky said we have the right to develop them and McFarland said he has the right to federal counsel to develop them and just last term in the case involving the bribed judges, the U.S. Supreme Court indicated you have the right to, in federal court, develop new claims.

Judge Fernandez: Let me ask. You're saying that, your reading of the current state of habeas corpus law is that, counsel has no obligation to exhaust purported claims in the California court system or to have them procedurally defaulted, whichever it is, before counsel comes to the federal court? That's how you read the law as it now stands?

Neuhoff: No. But...

Judge Fernandez: Well, then, if you have new claims, should they not be exhausted in the California court system?

Newhoff: When we get, yes. Once we get new claims, they will have to be exhausted. But McClesky gives us a right in federal court to do that which the state court denied us the right to do, which was develop claims and facts.

Judge Fernandez:: How did the state court deny you that right?

Neuhoff: Huh . . .

Judge Fernandez: On direct appeal, they said, hey, this isn't a direct appeal question. Develop it on post-conviction relief if you want to.

Neuhoff: Right. They don't, right, they don't...they did not...I'm intimately familiar with the state court record, so I would be . . .

Judge Fernandez: Okay, but tell me your federal point, though. We're talking now about a claim, let's say a good, let's just give it everything we can. The guy is incompetent and there is or may be a good federal constitutional claim out there, Okay?

Neuhoff: Right.

Judge Fernandez: And that claim has never been presented to the courts of the State of California or attempted to be presented.

Neuhoff: That's right.

Judge Fernandez: Okay? Now tell me ...

Neuhoff: That does not mean...

Judge Fernandez: Tell me, Tell me how you get that heard in federal court.

Neuhoff: The normal process would be. Well the first you have to discover the claim and that's where McClesky and those cases give us a right in federal court to discover the claim. Once we have discovered the claim ... and that's where we are now. Once we have discovered the claim, at that point, either that claim will have to go back and be litigated in state court before it can be decided on the merits in federal court, if it ever gets back to federal court.

Neuhoff: I don't think I said anything that is controversial, have I?

Judge Fernandez: So the denovement of that line of reasoning is if we can demonstrate or forget it. We have demonstrated let's say. He is incompetent.

Judge Fernandez: Ergo, we can, we can have a stay and we can stay all proceedings as long in the future as it takes for him to become competent again, so without ever presenting a habeas corpus claim to the federal courts, we can stay all state proceedings for the indefinite future until Mr. Kelly becomes competent. That, I think, is way you are saying, is that right?

Neuhoff: I don't know that we are saying it's indefinite, but I don't . . . I haven't heard.

Judge Fernandez: What's definite?

Neuhoff: Excuse me?

Judge Fernandez: What's definite or indefinite. I'm saying indefinite in the sense that he is not competent. According to him, he has not been competent since at least 1985, and he's not competent in 1997 and if I understand your position, I just want to get your position.

Judge Fernandez: Your position is, if he's not competent in the next 30 years, this stay should still remain in effect because for the next 30 years he still won't be competent to help counsel develop an unknown constitutional claim, correct?

Neuhoff: Well, number one, I guess number one is, the fact that he is mentally incompetent now, does not mean that he, under medication he could not be rendered competent.

Judge Fernandez: Sure, he might become ... but indefinite.

Neuhoff: That's a factual question that I assume is being part of the evidentiary hearing that is coming up. So you are asking me to assume the answer to a factual question I don't know.

Judge Fernandez: No, I'm just saying its indefinite. We don't know when he will be come competent but until he does, the stay should remain in effect, correct?

(silence)

Neuhoff: Can I have a second to talk to my co-counsel because this is ... I was hired for the limited purpose of the 848 subdivision (a)6 issue, not the big question, here. I don't want to say something that is inconsistent with their position, if you don't mind.

Judge Fernandez: Okay, why don't you take a minute. The time is running but take your time.

Neuhoff: The answer is yes.

Judge Fernandez: Okay, thank you.

Judge Tashima: Mr. Neuhoff, let me just pursue a related line of inquiry with you. First of all, you agree with Mr. Motley that the district court's order is not that the statute of limitations is tolled but that the Act does not apply?

Neuhoff: No.

Judge Tashima: You don't agree with that?

Neuhoff: No.

Judge Tashima: Well, how do you interpret the order?

Neuhoff: He just simply said what the court read to him which Your Honor read to him. He didn't say the Act...

Judge Tashima: Well, that the filing deadlines do not apply? What does mean, that the filing deadlines do not apply? That means it's tolled? Is that the way you read it?

Neuhoff: That's one possible ... that's, that's

Judge Tashima: Well, how do you read it? What do you think is the reasonable interpretation that we should give that, give that order?

Judge Tashima: What does it mean to you?

Neuhoff: Yes, it should be tolled.

Judge Tashima: Tolled?

Neuhoff: But it doesn't matter because ... if there are any grounds to support...

Judge Tashima: Why doesn't it matter?

Neuhoff: Because if there are any grounds to support what the district court did, even though not specifically relied on...

Judge Tashima: Well, is one ground one way to support the order that the statute is tolled?

Neuhoff: Yes.

Judge Tashima: All right, now. Tolled because of incompetency. In other words, that he can't, he can't aid his counsel, is that the basis for the tolling or what is it?

Neuhoff: The basis for the tolling is so that we can inquire into incompetency, yes.

Judge Tashima: All right, now.

Neuhoff: So we can make a decision whether he is incompetent or not and therefore, at that point, if he's not incompetent, we don't have to address the legal issues that ... Judge Fernandez was bringing up earlier.

Judge Tashima: First. The district court never made a finding, at least not so far, that Kelly is incompetent, right?

Neuhoff: That's right.

Judge Tashima: So, the only basis for the tolling would be to make an inquiry into whether or not he is competent.

Neuhoff: Yes.

Judge Tashima: Now that inquiry has been going on for what, two years or something like that? Several years?

Neuhoff: I think the doctor's report was early 95' if I'm right. And so, yes.

Judge Tashima: Well, you've had the proceedings stayed for over four years.

Neuhoff: But I don't know that there has ever been an objection on the Attorney General's point to the pace of the proceedings over that issue.

Judge Tashima: So then, you ... it's your position that the . . . it's a proper interpretation of the Anti-Terrorism Act that the statute of limitations can be tolled to inquire whether or not a putative habeas petitioner is competent to assist his counsel to prepare a petition? Right?

Neuhoff: Yes.

Judge Tashima: And then following up on that. If the court finds that yes, he is incompetent to that degree, then it should be further tolled until he becomes competent. However long that takes.

Neuhoff: Yes.

Judge Tashima: Simple, . . . (giggle)

Neuhoff: Let me go back a second to the applicability Act because I want to just get to the merits of that point. If it takes five minutes, I only have a minute left, so I'll either talk fast or I'll . . . the red light will come on.

Neuhoff: But let me just say a couple of things. This is really an issue of statutory interpretation. It's what does Congress mean in Section 107(c) of the Act by cases pending, because Lindh told us that's the dispositive issue in the case. The 1996 Act uses the word applications and petitions throughout. Yet, it chose to use, but it didn't say petitions pending in the retro-activity section. It said cases pending. It chose the word cases over the word applications and petitions that it used throughout the Act and it did so for a reason. And the reason is very clear, McFarland was decided just a year before that language got added to the Act and it said capital habeas cases can begin without the filing of a habeas corpus petition, so

Congress knew if it wanted to, say petitions, if it really wanted, or intended to mean petitions pending, it would have to say it or applications pending because McFarland just told them that.

Number two. There are statutes throughout the Act. There are four places in the Act where Congress used the word cases juxtaposed in the same sentence with the word application, and each one of those usages shows that the word cases is broader than the word applications. They are not synonymous terms.

Judge Fernandez: Counsel you are over your time. Why don't you take about 30 seconds or so to sum it up. Much of this argument is in your brief, I think.

Neuhoff: Right, it is in the brief. It's at some length.

Let me just say if there is no case pending, then what has been going on for the past two years. I mean there is something going on in the district court for the last two to four years and it's a case, it's not a petition, it's a case and that's just the words that Congress used when an appeal is filed before this court, the appeal is pending even before an opening brief is filed. And that is directly analogous here. The case was pending even though a petition hadn't been filed.

Thank you, Your Honor.

Motley: Just briefly, Your Honor. The court in Beeler granted equitable tolling to insure that the defendant in that case would have the assistance of counsel for a period of a year during which he could litigate his habeas matter.

In this case, Mr. Kelly has had counsel for over four years and they have not filed a petition. It would be no justification for equitable tolling because any issue that could be raised in the future could have been raised in the past, because we are dealing with just those issues that have been exhausted before the California Supreme

Court. To the extent that he is saying, there are issues that may never be discovered in the future; therefore, I need indefinite equitable tolling. Well, any petitioner could come in and say, there may be newly discovered evidence at some point in the future, therefore, stay this case indefinitely.

Unless the court has any questions ... (unt)

Judge Fernandez: Thank you counsel. We thank all counsel for argument and this case will stand submitted at this time and we will be in recess.

APPENDIX 4

FILED
CLERK, U.S. DISTRICT COURT
JUN - 3 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

United States District Court
Central District of California
Western Division

HORACE EDWARDS KELLY,
Petitioner,

v.

ARTHUR CALDERON, *etc.*,
Respondent.

CV 98-2722 TJH
CV 98-2723 TJH

Order

The Court has considered Petitioner's motion for equitable tolling, *ex parte* application to shorten time for the motion for leave to file an amended petition, motion for leave to file an amended petition, and motion to stay execution, together with the moving and opposing papers.

It is Ordered that the motion for equitable tolling be, and hereby is, Granted based on prior counsels' reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity.

It is further Ordered that the *ex parte* application to shorten time for the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion to stay Petitioner's execution be, and hereby is, Granted.

It is further Ordered that Petitioner's execution be, and hereby is, Stayed pending a final resolution of his petitions.

Date: June 3, 1998

Terry J. Hatter, Jr.
Chief United States District Judge